16 325

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~322~~ 56

THE STANDARD OIL COMPANY OF CLEVELAND, OHIO, PLAINTIFF IN ERROR,

vs.

GEORGE H. VAN ETTEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 13, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 322.

THE STANDARD OIL COMPANY OF CLEVELAND, OHIO, PLAINTIFF IN ERROR,

vs.

GEORGE H. VAN ETTEN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and proof of service	3	1
Writ of error	5	2
Citation	7	3
Attachment with return, &c	10	4
Petition for removal to United States court, bond, &c	14	6
Order for removal, &c	18	8
Declaration	21	10
Demurrer to declaration	39	16
Amended declaration	44	18
Plea and notice	60	24
First trial; disagreement	64	25
Order allowing plaintiff to amend declaration	64	25
Venire for second trial	65	25
Verdict and judgment	65	25
Motion for new trial	67	26
Denial of motion for new trial	69	27
Bill of exceptions	70	27
Assignment of errors	128	55
Copy bond to defendant in error	140	58
Clerk's certificate	146	60

1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgement, of a plea which is in the said circuit court, before you, between George H. Van Etten, as plaintiff, and the Standard Oil Company of Cleveland, Ohio, is defendant, a manifest error hath happened, to the great damage of the said Standard Oil Company of Cleveland, Ohio, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may
2 cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fifteenth day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] ADDISON MANDELL,
Clerk of Circuit Court of U. S., East. Dist. Mich.

Allowed by—

HENRY B. BROWN,
District Judge.

(Indorsed:) No. 5874. United States of America. Supreme Court. Standard Oil Company of Cleveland, Ohio, pl'ff in error, vs. George H. Van Etten, def't in error. Writ of error. Filed Nov. 15, 1877. A. Mandell, cl'k. Griffin & Dickinson, att'ys for pl'ff in error.

3 *Citation, &c.*

The United States of America, to George H. Van Etten, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein the Standard Oil Company of Cleveland, Ohio, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan and exercising circuit court powers, this fifteenth day of November, in the year of our Lord one thousand eight hundred and seventy-seven.

HENRY B. BROWN,
District Judge.

4 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

Moron Bunnell, being duly sworn, deposes and says that on the first day of February, A. D. 1878, he served the within citation on the within-named George H. Van Etten by delivering to him personally a true copy of the same, and showing to him the original with the signature of Judge Henry B. Brown thereto affixed; that he is deputy United States marshal for said district.

M. BUNNELL,
Deputy U. S. Marshal.

Subscribed and sworn to before me this first day of February, A. D. 1878.

LUTHER BECKWITH,
U. S. Commissioner.

Service, 2.00; miles, 120, 7.20, 9.20.

(Indorsed:) United States of America. Supreme Court. Standard Oil Company of Cleveland, Ohio, pl'ff in error, vs. Henry Van Etten, def't in error. Citation & proof of service returned & filed Feb'y 2, 1878. A. Mandell, cl'k. Griffin & Dickinson, att'ys for pl'ff in error.

5 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Michigan, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, between George H. Van Etten, as plaintiff, and the Standard Oil Company of Cleveland, Ohio, as defendant, a manifest error hath happened, to the great damage of the said Standard Oil Company of Cleveland, Ohio, as by its complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according
6 to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, this twenty-third day of September, in the year of our Lord one thousand eight hundred & seventy-nine.

[SEAL.] ADDISON MANDELL,
Clerk of the Circuit Court of the United States,
Eastern District of Michigan.

Allowed:

HENRY B. BROWN,
District Judge.

EASTERN DISTRICT OF MICHIGAN,
State of Michigan, County of Wayne, ss:

Levi T. Griffin, being duly sworn, deposes and says that on the 6th day of October, 1879, he lodged a true copy of the within writ of error for the adverse party in the office of the clerk of the circuit court of the United States for the eastern district of Michigan, by delivering the same to Addison Mandell, esq., clerk of said court.

LEVI T. GRIFFIN.

Subscribed & sworn to before me this 6th day of October, A. D. 1879.

A. MANDELL,
Comm'r Cir't C't U. S., E. D. of Mich.

7 *Citation.*

The United States of America to George H. Van Etten, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Michigan, wherein the Standard Oil Company of Cleveland, Ohio, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Henry B. Brown, judge of the district court of the United States for the eastern district of Michigan and exercising circuit court powers, this twenty-third day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

HENRY B. BROWN,
District Judge.

8 5874.

Pleas before the judges of the circuit court of the United States for the eastern district of Michigan, in the sixth circuit, at the district court-room in the city of Detroit, of the term of November, in the year one thousand eight hundred and seventy-seven, in the case wherein George H. Van Etten is plaintiff and the Standard Oil Company of Cleveland, Ohio, is defendant.

Be it remembered that on the second day of March, A. D. 1876, said defendant by Griffin & Dickinson, his attorneys, came into this court and filed a transcript of record and proceedings in said cause in the circuit court for the county of Genesee in the State of Michigan, said cause having been removed into this court under and by virtue of the statutes of the United States in such case made and provided, which transcript is in the words and figures following, to wit:

TRANSCRIPT OF RECORD FROM GENESEE CIRCUIT COURT.

The circuit court for the county of Genesee.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

COOK, *Clerk:*

Please issue writ of attachment in the above-entitled cause

9 and make the same returnable on Tuesday, *returnable on Tuesday* the 1st day of February, A. D. 1876.

Yours, &c.,

GASKILL & GEER,
Att'y for Pl'ff.

Filed Jan'y 10, 1876. (S'g'd) L. D. Cook, clerk.

Aff't for attachment.

STATE OF MICHIGAN,
County of Genesee, ss:

Hamilton Geer, being duly sworn, deposes and says that he is one of the attorneys for George H. Van Etten, the plaintiff in the annexed writ of attachment, and as such makes this affidavit for and on behalf of said Van Etten. Deponent further says that the Standard Oil Company of Cleveland, Ohio, a corporation duly organized under the laws of the State of Ohio, and doing business at the city of Cleveland in said State of Ohio, the defendant named in said writ, is indebted to the said plaintiff, George H. Van Etten, in the sum of ten thousand dollars, a near as may be, over and above all legal set-offs, and that the same is now due upon contract express and upon contract implied; and this deponent further says that he has good reason to believe and does believe that the defendant, The Standard Oil Company of Cleveland, Ohio, is a foreign corporation located and doing business at the city of Cleveland in the State of Ohio, and further saith not.

(Sig'd) HARRISON GEER.

Subscribed & sworn to before me this 10th day January, 1876.

(Sig'd) L. D. COOK, *Clerk.*

10 *Attachment & return.*

STATE OF MICHIGAN,
County of Genesee, ss:

The circuit court for the county of Genesee.

In the name of the people of the State of Michigan to the sheriff of the county of Genesee, greeting:

You are commanded to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendant, The Standard Oil Company of Cleveland, Ohio, not exempt from execution, wheresoever the same may be found within the county of Genesee, as will be sufficient to satisfy the demand of George H. Van Etten, plaintiff, and costs of writ, and safely keep the same, to satisfy any judgment that may be recovered by the plaintiff in this attachment.

And in case you shall seize any property of said defendant in said county, but not sufficient to satisfy said demand and costs, then you are hereby further commanded to seize other property of said defendant, subject to attachment, sufficient, with that seized in said county of Genesee, to satisfy said demand and costs, wherever the same may be found in the State of Michigan.

You are also commanded to summon the defendant, if to be found within said county of Genesee, or in any other county of the State of Michigan where you may have seized property under and by virtue of this writ, to appear before the circuit court for the county

of Genesee, at the court-house, in the city of Flint, on Tuesday, the first day of February, 1876, at 10 o'clock in the forenoon of said day, to answer the plaintiff, and of this writ make due return.

Witness the honorable Josiah Turner, circuit judge, at the city of Flint, this tenth day of January, in the year of our Lord one thousand eight hundred and seventy-six.

[L. S.] (S'g'd) L. D. COOK, *Clerk.*
Deputy Clerk.

Attorney for Plaintiff.

11 By virtue of the within writ of attachment I have this day seized and taken the property and effects of the within-named defendants, to wit, all of the within defendants' interest in about seven hundred and fifty thousand oil-barrel heading piled on two acres of land leased by the Standard Oil Company of Cleveland, Ohio, of T. B. W. Stockton, and situated on line of F. & P. M. R. Road, in 3d ward city of Flint.

Dated this 10th day of January, A. D. 1876.

EUGENE PARSELL, *Sheriff.*

(Indorsed:) No. 3065. The circuit court for the county of Genesee. Geo. H. Van Etten vs. The Standard Oil Company of Cleveland, Ohio. Writ of attachment. Filed Feb'y 5, 1876. (S'g'd) L. D. Cook, clerk. Gaskill & Geer, plaintiff's *p*tt'ys.

12 *Sheriff's return.*

STATE OF MICHIGAN,
County of Genesee, ss:

I do hereby return that by virtue of the annexed writ of attachment I have this 10th day of January, A. D. 1876, attached the following-described property, to wit, seven hundred and ninety-five thousand oil-barrel heading, all of which said property was appraised by John Pirnie and John Zimmerman, two disinterested freeholders, who were by me first duly sworn to make a true appraisement thereof, and whose appraisal is in writing, signed by themselves, and herewith returned; and I do further return that I have been unable to find either of the defendants in said writ named in my bailiwick and could not serve a copy of said attachment on them.

Dated this 1st day of February, A. D. 1876.

The answer of—
(S'g'd) EUGENE PARSELL, *Sheriff.*
My fees, $10.

Appraisal.

We, the undersigned freeholders, residing in the county of Genesee, having been first duly sworn by the sheriff of the county of Gene-
13 see to make a true appraisement of all the property seized by him by virtue of the annexed writ of attachment, do appraise the several articles and parcels of property so attached as follows, to wit: Seven hundred and ninety-five thousand oil-barrel heading, $27,825.00.

(S'g'd) JOHN PIRNIE, *Appraisers.*
(") JOHN ZIMMERMAN, "

14 *Petition and bond for removal to U. S. court.*

Circuit court for the county of Genesee.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

To the honorable the circuit court for the county of Genesee:

The petition of the Standard Oil Company of Cleveland, Ohio, the defendant in the above-entitled cause, respectfully shows:

1. That a suit was commenced on or about the tenth day of January, A. D. 1876, in the said circuit court for the county of Genesee, by the above-named George H. Van Etten, as plaintiff, against your petitioner, as defendant.

2. That the said plaintiff is, and was at the time said suit was commenced, a citizen of the State of .

3. That your petitioner is, and was at the time said suit was commenced, a corporation organized and existing under the laws of the State of Ohio, having its principal office in said State, and is, within the meaning of the acts of Congress, a citizen of the said State of Ohio.

4. That the said plaintiff claims in the affidavit for attachment in this suit, as damages against your petitioner, the sum of ten thousand dollars, and that the matter in dispute in suit therefore exceeds the sum of five hundred dollars, exclusive of costs.

5. That your petitioner, the said defendant, is ready and willing to give good and sufficient surety as this court may direct for doing all the acts and things required to be done by the provisions of law upon the removal of the said suit into the circuit court of the United States, and offers herewith the bond of said defendant and Levi T. Griffin & Asa D. Dickinson in the penal sum of five hundred dollars, conditioned that your petitioner shall enter in the next circuit court of the United States for the eastern district of Michigan, on the first day of its next term or session, copies of all process, pleadings, and other proceedings in the said suit, and doing such other appropriate acts as by the acts of Congress are required to be done upon the removal of a suit into the said circuit court of the United States.

Wherefore your petitioner prays that the said bond may be accepted as good and sufficient surety according to the said provisions of law; that your petitioner may have leave to remove the said cause into the said circuit court of the United States, pursuant to the statute in such case made and provided, and that all further proceedings in this court may be stayed. And your petitioner will ever pray, &c.

THE STANDARD OIL COMPANY,
By LEVI T. GRIFFIN, *its Att'y in Fact.*

GRIFFIN & DICKINSON,
Defendants' Attorneys.

Petition for removal, &c.

15 STATE OF MICHIGAN,
County of Wayne, ss:

Be it remembered that on this seventeenth day of February, A. D. 187 , before me personally appeared the above-named Levi T. Griffin, and made oath that he was one of the attorneys of the said defendant

corporation, as well as att'y in fact; that he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge; that he is authorized by said Standard Oil Company to make, sign, and verify the said petition.

(Sig'd) LEVI T. GRIFFIN.

Subscribed & sworn to before me this seventeenth day of February, A. D. 1876.

SAMUEL J. KELSO,
Notary Public, Wayne Co., Mich.

Know all men by these presents that we, the Standard Oil Company of Cleveland, Ohio, and Levi T. Griffin and Asa D. Dickinson, are held and firmly bound unto George H. Van Etten in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said George H. Van Etten, his executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, and each of them, firmly by these presents. Sealed with our seals, dated the seventeenth day of February, A. D. 1876.

Whereas the said George H. Van Etten, as plaintiff, has commenced against the said Standard Oil Company of Cleveland, Ohio, as defendant, a certain suit in the circuit court for the county of Genesee; and whereas the said defendant has filed its petition in the said circuit court for the removal of said suit into the next circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named Standard Oil Company of Cleveland, Ohio, shall enter, or cause to be entered, in the said circuit court of the United States on the first day of its next term or session copies of all process, pleadings, and other proceedings in said suit, and do and cause to be done such other appropriate acts as are required to be done upon the removal of a suit into the circuit court of the United States, and pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, then the above obligation shall be void; otherwise it shall remain in full force and virtue.

(Sig'd) THE STANDARD OIL COMPANY,
By LEVI T. GRIFFIN, [L. S.]
Its Att'y in Fact.

(") LEVI T. GRIFFIN. [L. S.]
A. D. DICKINSON. [L. S.]

16 STATE OF MICHIGAN,
County of Wayne, ss:

Levi T. Griffin and Asa D. Dickinson, the sureties named in the foregoing obligation, being duly sworn, severally depose and say that they are residents of the State of Michigan, and are worth the sum of two thousand dollars each over all just debts and liabilities, in real estate, subject to execution in said county of Wayne.

(Sig'd) LEVI T. GRIFFIN.
" A. D. DICKINSON.

Subscribed and sworn to before me this seventeenth day of February, 1876.

SAMUEL J. KELSO,
Notary Public, Wayne County, Mich.

Circuit court for the county of Genesee.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

Please take notice, that we are retained for the defendant in the above-entitled cause, and that upon the petition of the said defendant, and the bond accompanying the same, and copies of which said petition and bond are hereto annexed and upon the files and records of said cause, we shall move the said court on the twenty-third day of February, A. D. 1876, at the opening of court in the morning of said day, or as soon thereafter as counsel can be heard, for an order staying all proceedings in the said suit, and for leave to remove the same to the circuit court of the United States for the eastern district of Michigan, as prayed in said petition.

GRIFFIN & DICKINSON
Defendant's Attorneys.

To GASKILL & GEER,
Plaintiff's Attorneys.

STATE OF MICHIGAN,
County of Wayne, ss:

Edward Cullen, being duly sworn, deposes and says that on the seventeenth day of February, A. D. 1876, he served a notice, of which the within is a true copy, upon the within-named Gaskell & Geer, plaintiff's attorneys, my mailing the same to them at Lapier, Michigan, postage prepaid, and that said notice was accompanied by copies of the within petition and bond.

(Sig'd) EDWARD CULLEN.

Subscribed and sworn to this 17 day of February, 1876, before me.

(Sig'd) HENRY T. THURBER,
Notary Public, Wayne Co., Mich.

17 (Indorsed:) No. . Circuit court county of Genesee. George H. Van Etten vs. The Standard Oil Company, of Cleveland. Petition and bond for removal to U. S. court. Filed Feb'y 23, A. D. 1876. L. D. Cook, clerk. Griffin & Dickinson, def't's attorneys.

18 At a general term of the circuit court for the county of Genesee, continued and held at the court-house in the city of Flint, in said county, on Wednesday, the twenty-third day of February, A. D. 1876.

Present, Hon. Josiah Turner, district judge, the court was opened for business in due form.

Order for removal.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

In the above-entitled cause, on reading and filing the petition of The Standard Oil Company of Cleveland, Ohio, by Levi T. Griffin, its at-

torney in fact, and in filing a good and sufficient bond as required by the statutes of the United States, and it satisfactorily appearing to the court now here that the defendant therein is a resident of the State of Ohio and not a resident of the State of Michigan, on motion of Griffin and Dickinson, attorneys for defendant, it is ordered by the court now here that the said defendant have leave to remove the above-entitled cause to the circuit court of the United States for the eastern district of Michigan, and that all further proceedings in this court be stayed.

19 STATE OF MICHIGAN,
County of Genesee, ss:

I, Lorenzo D. Cook, clerk of the circuit court for said county, do hereby certify that the above and foregoing are the original files and a true copy of the order made in the case of George H. Van Etten vs. The Standard Oil Company of Cleveland, Ohio; that I have compared said copy of an order with the original now of record in my office, and that it is a true transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Flint, this 1st day of March, A. D. 1876.

[L. S.] (Sig'd) L. D. COOK, *Clerk.*

(Endorsed:) Filed March 2d, 1876. A. Mandell, cl'k.

And thereafter said defendant, on the 7th day of March, A. D. 1876, came into this court & filed a precipe in the words & figures following, to wit:

Precipe to clerk to enter order.

United States circuit court for the eastern district of Michigan.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

SIR: Please enter the usual order that the above-entitled cause, which has been removed from the circuit court for the county of Genesee, be entered in the above-entitled court.

Yours, &c.,

GRIFFIN & DICKINSON,
Defendant's Attorney.

March 7, 1876.

TO ADDISON MANDELL, Esq.,
Clerk of said Court.

Thereupon an order was entered in said court, on the first day of the term thereof, in the words & figures following, to wit:

20 At a session of the circuit court of the United States for the eastern district of Michigan, begun and held at the district court-room, in the city of Detroit, on Tuesday, the seventh day of March, in the year one thousand eight hundred and seventy-six.

Present, honorable Halmer H. Emmons, circuit judge.

Order that cause be entered, &c.

GEORGE H. VAN ETTEN *vs.* THE STANDARD OIL COMPANY OF CLEVELAND.	5874. Case removed from the circuit court for the county of Genesee.

On reading the process, pleadings, and other proceedings in the circuit court for the county of Genesee on file in this court, as duly certified from said court, and on motion of Griffin & Dickinson, attorneys for defendant, which is the petitioner for the removal of said cause into this court, it is ordered by the court now here that the said cause be, and the same is hereby, entered in this court in due form as of this date.

21 Afterwards, to wit, on the 18th day of April, A. D. 1876, said plaintiff by his said attorneys came into said circuit court of the United States for the eastern district of Michigan and filed his declaration in said cause in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the eastern district of Michigan.

GEORGE H. VAN ETTEN *vs.* THE STANDARD OIL COMPANY OF CLEVELAND, Ohio, a party corporate, created by and existing under and by virtue of the laws of the State of Ohio.	

EASTERN DISTRICT OF MICHIGAN, *ss:*

George H. Van Etten, plaintiff herein, by Gaskell & Geer, his attorneys, complains of the Standard Oil Company of Cleveland, Ohio, a body corporate, created by and existing under & by virtue of the laws of the State of Ohio, defendant herein, of a plea of trespass on the case upon promises, the said defendant having been duly examined to appear in said cause.

For that whereas the said defendant on the 10th day of January, 1876, at Flint City, in said eastern district of Michigan, was in-

22 debted to the plaintiff in the sum of ten thousand dollars, by reason of the unfulfillment of certain contracts hereinafter described and in substance set forth in words and figures as follows:

The memorandum of agreement made in duplicate this fourth day of October, eighteen hundred and seventy-three, by and between J. J. Merritt, of Lapeer, Michigan, party of the first part, and the Standard Oil Company of Cleveland, of the other part, witnesseth: That J. J. Merritt has this day sold two million (2,000,000) heading, suitable for oil-barrels, upon the following terms and conditions, to wit: To be sawed twenty-two inches in length, full one inch thick on sap, and full one-half inch thick on the heart edge, and whenever more than two pieces are required to make a head, the same shall count as two, to be well manufactured from good, sound white or burr oak, and to be in every resphct a first-class merchantable article, to be delivered on board of cars in Cleveland, Ohio, on or before the first day of March, 1875, subject to count and inspection by the Standard Oil Co., who agree to

receive and pay for the same, as fast as inspected, at the price of forty dollars per thousand.

J. J. Merritt also agrees that full one-half of the above two
23 million (2,000,000) heading shall run full two-pieced heading. Said Standard Oil Company also agree that in case the above two million heading are delivered and full one-half of them are two-pieced heading, and the other half not more than three pieced, they will then pay said J. J. Merritt the additional one dollar per thousand on the whole two millions heading. It is also agreed that said J. J. Merritt shall have the privilege of making sight draft through bank on said Standard Oil Company for twenty-five (25) dollars per thousand heading, accompanied by duplicate bill of lading signed by railroad company as evidence of shipment of cars on which drafts are made. It is further agreed that cars shall be so loaded as to have a net value in Cleveland of amount of draft after culling and paying freight.

Lapeer, Michigan, October 4th, 1873.

J. J. MERRITT,
STANDARD OIL COMPANY,
Per S. H. COOK.

To which said contract is attached an assignment, executed by said J. J. Merritt, which is in words and figures as follows, to wit:

"For value received I hereby sell, transfer, and assign to Henry
24 Helm, of Bay City, Michigan, one-half interest in a certain contract (hereto annexed) executed by and between myself of the first part and The Standard Oil Company of Cleveland, Ohio, party of the second part, dated October 4th, 1873, whereby I have agreed to deliver to said company two million oil-barrel heading.

In witness whereof I have hereunto set my hand & seal this 13th day of June, 1874.

J. J. MERRITT. [SEAL.]

Whereas a certain contract was made and entered into on the 4th day of October, A. D. 1873, by and between J. J. Merritt, of Lapeer, Lapeer Co., Mich., of the first part, and The Standard Oil Co. of Cleveland, Ohio, of the second part, relating to the sale and delivery of two million (2,000,000) white-oak heading, which contract J. J. Merritt, of Lapeer, Mich., and Henry Helm, of Bay City, Mich., comprising the firm of J. J. Merritt & Co., propose to assume & continue, subject to the modification hereinafter mentioned; and whereas it is for the accommodation of said J. J. Merritt & Co. that they receive certain advances upon said heading before the time agreed upon in said contract, and they having requested the same: Now, therefore, it is agreed by and between the said firm of J. J. Merritt & Co., as party of the first part, and said Standard Oil Company, as party of the second part,
25 as follows, to wit: Said first party agrees to make and deliver to second party the heading (not yet delivered) according to the terms of said contract, properly piled in some suitable convenient place to be agreed upon by said parties on land in Lapeer, in said Lapeer County, controlled by said second parties, the delivery to be made as fast as sawed by said first party; said second parties are to furnish a man to count as nearly as may be said heading from week to week, as the same is piled, which will require one-half day each week, the other 5½ days in each week said first parties are to furnish said man employment about said heading business at full, fair wages so as to keep said man employed all the time at a fair remuneration, provided that second

party may furnish employment for said man and shall be entitled to his remuneration wherever they need him, balance of time to be employed by first parties. When said heading shall be piled & counted said counter shall give the first parties a certificate of the amount paid since any former count, but such certificate shall not be considered as final, it being fully understood and agreed that said counter is not employed as an inspector, but that his duties are confined to his obtaining
26 as much as may be possible an approximate estimate of the heading thus piled for the purpose of delivering from time to time the amount of advances the first party shall be entitled to receive as stipulated herein. Whereupon the delivery of said heading so counted shall be deemed complete, and said heading shall then become thenceforth be the property of second party absolutely and unconditionally, and upon the presentation of such certificate of count at the office of said party in Cleveland, Ohio, said second party agrees to pay upon the heading so as aforesaid delivered and counted the sum of twenty dollars per thousand heading, by draft on New York. It is further agreed that as the agent of second party said first party shall, on or before the first day of July, A. D. 1874, begin to draw, ship, and forward said heading and continue to draw, ship, and forward the same at the rate of not less than 100 M per month thereafter to second party at the place, in the manner, and upon the terms agreed upon in said contract, at their own expense. It being mutually agreed that any and all heading that may be piled up by said first parties shall be allowed to stand three months before the second party shall have the privilege of calling for the shipment of the same, and the second party have the privi-
27 lege of insisting upon any heading that may have been piled being allowed to remain piled five months before its shipment. The second party also has the privilege at any time of calling upon the first party to go on and make the shipments direct from the saw, as agreed in original contract; and it is further agreed that on and after the 1st of November, 1874, the first parties are to have the privilege of shipping direct from the saw, it being understood that the intention of all parties is to have the delivery of the whole two millions of heading completed by the first of March, 1875. Second party agrees to pay to first party the balance of the contract price of said heading as stipulated in said contract; provided however, that there shall be deducted therefrom interest at 10 % per annum on the balances of twenty dollars per M. made as aforesaid from time paid till heading shall be received at Cleveland aforesaid as per terms of said contract; also, all sums which second party may have paid for insuring said heading against loss by fire after delivery of same to it at Lapeer as aforesaid; and which insurance first parties hereby authorize & request second party to obtain the amount of twenty-one dollars per M.
28 And provided further, that if said heading shall be destroyed by fire before its delivery at Cleveland, the loss above said twenty-one dollars per M. shall fall upon first parties. And it is further agreed that if first parties should fail to draw, ship, or forward to second party at Cleveland the heading aforesaid at the time and in the manner provided in his contract, and in the contract to which this is supplementary, then in this case second party is authorized to do it, and to deduct all the expense of every kind which shall attend the doing of it from the balance of the contract price of said heading; and shall also deduct said 10 % interest on advances and all allowances and insurance premiums, and should any balance of said contract price then remain,

second parties are to pay it to first parties, but should the sum exceed the contract price, the first party shall, on demand, pay second party such excess. All the provisions of the contract first above referred to in regard to specifications, delivery, price, inspection, culling, and all other things not expressly changed by this contract are to remain in force; this being a modification of said contract in regard to the particulars herein expressly stated, and made for the benefit and at
29 request of first parties and for no other purpose.

In witness whereof said parties have signed their names hereto this first day of April, A. D. 1874.

J. J. MERRITT & CO.,
Per J. J. MERRITT.
STANDARD OIL COMPANY,
By A. M. McGREGOR.

It is mutually agreed that the advance shall be twenty-five doll's ($25.00) per M. on the first million of heading, instead of twenty doll's ($20) as provided above.

J. J. MERRITT & CO.
J. J. M.
STANDARD OIL CO.,
By A. M. McGREGOR.

30 And whereas, since making the foregoing contracts dated October 4th, 1873, and on April 1st, 1874, and since the latter date, through an error made by the inspector employed by said Standard Oil Company, the said J. J. Merritt & Co. have received from the said Standard Oil Company money in excess of the amount said Merritt & Co. were entitled under said contracts to receive, which excess amounts in round numbers to the sum of twenty-five hundred dollars; and whereas said Merritt and Co. are legally bound to refund to said Standard Oil Company, without delay, said twenty-five hundred dollars; and whereas such repayment at this time would greatly inconvenience said J. J. Merritt & Co.: Therefore, this agreement, made at the earnest request and solely for the accommodation of the said J. J. Merritt & Co., party of the first part, and The Standard Oil Company of Cleveland, Ohio, party of the second part, witnesseth: The Standard Oil Company hereby consent to extend the term of repayment of said twenty-five hundred dollars for the period of ninety days from the date thereof, upon the following terms and conditions, to wit: Said J. J. Merritt & Co. shall execute to said Standard Oil Company their note se-
31 cured by mortgage, for said sum of twenty-five hundred dollars, dated May 29th, 1874, due in ninety days, with interest at 10%, which they hereby agree to pay with interest as agreed at its maturity. In consideration of the said extension the said party of the first part hereby agrees to and with the party of the second part as follows: That said first party shall, upon the request of said second party, extend the period for holding the heading named in the aforesaid contracts from five months to eight months; all other terms and conditions of said contracts not inconsistent with this agreement remaining unchanged. In the event said second party shall so elect, it shall also have the right to extend said storage period beyond the eight months a further period, viz, until April 15th, 1875; provided, however, that if such privilege is claimed by said second party it shall release said first party from the payment of interest and expense of insurance after the expiration of said period of eight months; but if, through any unfor-

seen cause, and not at the request of said second party, the shipment of said heading is delayed beyond said period of eight months,
32 then, in that event, said first party shall pay to said second party interest, as already agreed, and, in addition thereto, shall, at their own cost, continue to pay cost of insurance, as heretofore provided.

Cleveland, Ohio, May 29th, 1874.

J. J. MERRITT & CO.,
STANDARD OIL COMPANY,
By A. M. McGREGOR.
B.

And whereas, since making the foregoing contracts dated October 14th, 1873, and April 1st, 1874, and in May 29th, 1874, and whereas; the amount of advances of twenty dollars per thousand pieces of heading, as agreed in the supplementary contract of April 1st, 1874, is deemed insufficient by said J. J. Merritt & Co.: Therefore this agreement, made at the earnest request and solely for the accommodation of said J. J. Merritt & Co., party of the first part, and the Standard Oil Co. of Cleveland, Ohio, party of the second part, witnesseth: The Standard Oil Company hereby agree to advance the sum of twenty-five dollars (25.00) per thousand pieces on the second million of heading, as provided in said supplementary contract. In consideration of the said increase in the amount advanced the party of the first part hereby agrees to and with the party of the second part as follows:

That said first party shall, upon the request of said
33 second party, extend the period for holding the heading named in the aforesaid contract from five months to six months; all other terms and conditions of said contract not inconsistent with this agreement remaining unchanged. In the event said second party shall so elect, it shall also have the right to extend said storage period beyond the six months a further period, viz, until August 1st, 1875; provided, however, that if such privilege is claimed by said second party it shall release said first party from the payment of interest after the expiration of said period of six months; but if, through any unfor'seen cause, and not at the request of said second party, the shipment of said heading is delayed beyond said period of six months, then, in that event, said first party shall pay to said second party interest, as already agreed. It is further agreed by the first party that if not requested at an earlier date by the second party they will load and forward the second million of heading during the period extending from August 1st, 1875, to January 1st, 1876, and said first party shall, at their own cost, continue to pay cost of insurance for the above period, as heretofore provided.

34 In witness whereof said parties have signed names hereto this 28th day of August, A. D. 1874.

J. J. MERRITT & CO.
STANDARD OIL COMPANY,
By A. M. McGREGOR.

And the said plaintiff further complains and alleges that said cause of action arising under said contracts was duly assigned to him, the said plaintiff, before the commencement of this action, a copy of which assignment is in words and figures as follows, to wit:

For a valuable consideration to us in hand paid by George H. Van Etten, of Bay City, Michigan, we, Henry Helme and John J. Merritt, do thereby sell, assign and transfer to said Van Etten all of our right,

title, and interest of, in, and to any and all claims and demands of every name and nature which we may now have & hold against the Standard Oil Company of Cleveland, Ohio, arising and growing out of a certain contract dated the 4th day of October, 1873, between said Standard Oil Company and said John J. Merritt, and three supplemental contracts made between said Standard Oil Company and said John J. Merritt and Henry Helme, dated April 1st, 1874, May 29th, 1874, & August 28th, 1874, respectively, and do hereby authorize
35 the said Van Etten to sue, collect, and receive any and all sums of money overdue from said Standard Oil Company by reason of the non-payment of money due us under said contracts, & do authorize him to sue & collect for any and all damages that we might be entitled to by reason of the non-fulfillment of said contracts by said Standard Oil Company, & do hereby authorize him to collect the sum in his own name, but at his own expense.

Dated January 8th, 1876.

HENRY HELME.
JOHN J. MERRITT.

And the said plaintiff further alleges and claims that by virtue of said assignment he is lawfully entitled to claim and recover against said defendant any sum there may be due from said defendant by reason of the non-fulfillment of said contracts hereinbefore set forth.

And the said plaintiff further complains against the said defendant for that there is due him by virtue of said assignment from the said defendant a large sum of money, to wit, ten thousand dollars, for the sale and delivery of a large amount of heading suitable for oil barrels, to wit, three million, which said heading were sold & delivered to the said defendant under and by virtue of the terms of said contracts.

And the said plaintiff further complains against the said de-
36 fendant for that there is his due from the said defendant by virtue of said assignment a large sum of money, to wit, ten thousand dollars, for heading sold and delivered to said defendant before the making of said assignment, under and by virtue of the terms of said contract, to wit, three million pieces made, sold, and delivered by said John J. Merritt and Henry Helme, to the said Standard Oil Company, the said defendant.

And the said plaintiff further complains against the said defendant for that the said defendant failed, neglected, and refused to perform the conditions of said contracts in that it has neglected and refused to pay said John J. Merritt and Henry Helme, for the heading so sold and delivered as aforesaid, by reason of which actings and doings and the refusal of the said defendant to perform the condition of the said contract on its part, and its refusing to pay for the heading, as by the terms of said contract the said defendant did agree to do upon the delivery of said heading at the times, place, & manner stated in said contract, a right of action hath accrued to the said plaintiff by virtue of said contracts and the assignment hereof hereinbefore stated. The said John J. Merritt and Henry Helme having fulfilled said contract on their
37 part, and the said defendant having failed to perform said contract on its part, by reason of which refusal to perform said contract in refusing to pay for the heading so sold and delivered by the said John J. Merritt & Henry Helme as aforesaid the said plaintiff hath sustained great damage, to wit, ten thousand dollars.

And the said plaintiff further complains against the said defendant for that the said John J. Merritt and Henry Helme sold and delivered

to the said defendant about three million pieces of heading, which were received and accepted by the said defendant afterward and on the day and year aforesaid, in consideration of the premises respectively, there and then promised the plaintiff to pay him for the heading so received and accepted by said defendant as aforesaid; yet the said defendant has disregarded the said promises, and has not (although often requested so to do) paid any portion of the money due him under said contracts, and the assignment thereof, as hereinbefore stated. By reason of which actings, doings, and the refusal of said defendant to pay as by the terms of said contract he had agreed to do, the said plaintiff has sustained great damage, to wit, ten thousand dollars.

38 For that whereas the defendant, on the eighth day of January, A. D. 1876, at Flint, in said eastern district of Michigan, was indebted to the plaintiff in the sum of ten thousand dollars for the price and value of the goods then and there sold and delivered by the plaintiff to the defendant at its request.

And in a like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendant at its request.

And in a like sum for money then and there lent by the plaintiff to the defendant at its request.

And in a like sum for money then and there paid by the plaintiff for the use of the defendant at its request.

And in a like sum for money then and there received by the defendfor the use of the plaintiff.

And in a like sum for money then and there found to be due from the defendant to the plaintiff on an account stated between them.

And thereupon the said defendant afterwards, and on the day and year aforesaid, in consideration of the premises respectively, then and there promised the plaintiff to pay him the said several sums of money respectively on request; yet the said defendant has disregarded

39 its said promises, and has not (although often requested so to do) paid any of the said sums of money or any part thereof, to the plaintiff's damage of ten thousand dollars, and therefore he brings suit, etc.

GASKELL & GEER,
Plaintiff's Attorneys.

Afterwards, to wit, on the 21st day of April, A. D. 1876, the said defendant came into said court, by Griffin and Dickinson, their attorneys, and filed a demurrer to the special count of said declaration; which demurrer *in* in the words and figures following, to wit:

Demurrer to declaration.

United States circuit court for the eastern district of Michigan.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, OHIO.

And the said defendant, by Griffin and Dickinson, its attorneys, comes and says that the special count in the said declaration of the said plaintiff filed in the above-entitled cause is not sufficient in law.

And for special cause of demurrer the defendant now here shows unto the court:

40 1st. It does not appear from said special count how the said defendant is indebted to said plaintiff in the sum of ten thousand dollars by reason of the non-fulfillment of certain contracts therein described.

2nd. The substance of said contract, and not their precise terms in wording, is alleged to be set out in said special count, without setting forth the legal effect of said contract.

3d. It is not averred in said special count that either of said contracts set forth therein are signed or executed by said defendant.

4. It does not appear from said special count with sufficient certainty whether said several contracts set out in said declaration are separate and distinct contracts with reference to the subject-matter thereof, or modifications of each other, or of some one of those therein contained.

5. The assignment to Henry Helme is set forth in full.

6. It does not appear with sufficient certainty how the contract immediately following said assignment affects the rights of defendant or of said Merritt, Helme, or the plaintiff, or whether it is or is not
41 affected by said assignment.

7. The assignment to said plaintiff is set forth in full and not according to its legal effects.

8. Said last assignment and the averments in regard to same are put in said declaration between the statements of said contracts and the alleged breach or breaches of the same.

9. A number of other immaterial averments are put between the statement of said contracts and the alleged breach or breaches of the same.

10. Said special count contains several causes of action, and is bad for duplicity.

11. Said special count has mingled and blended with it what would seem to be common counts.

12. It does not appear from said count how far, if at all, said first contract has been performed before the assignment to said Hellme.

13. There is no proper averment of the breach of said contracts
42 or any of them in said special count.

14. There is no proper averment of the performance of said contracts or any of them in said special count.

15. The several averments in said count contained lack the requisite certainty.

16. The matters averred or sought to be averred in said special count are alleged in an unintelligible, ambiguous, and argumentative manner, and are not in accordance with approved precedents.

17. Said special count is in other respects uncertain, informal, & insufficient.

GRIFFIN & DICKINSON,
Attorneys for Def'ts.

UNITED STATES OF AMERICA,
Eastern District of Michigan,
State of Michigan, County of Wayne, ss:

Edward Cullen, being duly sworn, deposes and says that on the 21st day of April, 1876, he served a copy of the within demurrer on Gaskell and Geer, attorneys for the plaintiff in the above-entitled cause, by putting the same, with postage prepared, in the post-office at Detroit,
43 Michigan, directed to said Gaskell & Geer, Lapeer, Lapeer County, Michigan.

EDWARD CULLEN.

Subscribed and sworn to before me this 21st day of April, A. D. 1876.

HENRY THOMSON,
Notary Public, Eastern District of Michigan,
Wayne County, Michigan.

Afterwards, to wit, on the 2nd day of May, 1876, said plaintiff, by his said attorneys, came into said court and filed his amended declaration in said cause, in the words and figures following, to wit:

44 *Amended declaration.*

In the circuit court of the United States and eastern district of Michigan.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

EASTERN DISTRICT OF MICHIGAN, *ss:*

George H. Van Etten, plaintiff herein, by Gaskell & Geer, his attorneys, complains of the Standard Oil Company of Cleveland, Ohio, a body corporate created by and existing under & by virtue of the laws of the State of Ohio, defendant herein, of a plea of trespass on the case upon promises, the said defendant having been duly summoned to appear in said cause, for that whereas heretofore, to wit, at Lapeer, in said eastern district of Michigan, on the 4th day of October, 1873, one John J. Merritt entered into a certain contract in writing with the said defendant, which said contract was duly signed and executed by John J. Merritt as party of the first part, & by the defendant as party of the second part, and is in words & figures as follows, to wit:

This memorandum of agreement, made in duplicate this fourth day of October, eighteen hundred and seventy-three, by & between J. J. Merritt, of Lapeer, Michigan, party of the first part, and the Standard Oil
45 Company of Cleveland, Ohio, of the other part, witnesseth: That J. J. Merritt has this day sold the Standard Oil Company two million (2,000,000) heading, suitable for oil barrels, upon the following terms & conditions, to wit: To be sawed twenty-two (22) inches in length, full one inch thick on sap and full one-half inch thick on the heart edge, and whenever more than two pieces are required to make a head the same shall count as two; to be well manufactured from good, sound white or burr oak, & to be in every respect a first-class merchantable article; to be delivered on board the cars at Cleveland on or before the first day of March, 1875, subject to count & inspection by the Standard Oil Company, who agree to receive & pay for the same as fast as inspected, at the price of forty dollars per thousand. J. J. Merritt also agree that full one-half of the above two million (2,000,000) heading shall run full two-pieced heading; said Standard Oil Company also agree that in case the above two million heading are delivered, and full one-half of them are two-pieced heading, and the other one-half not more than three-pieced heading, they will then pay said J. J. Merritt an additional one dollar per thousand on the whole two million heading. It is also agreed that said J. J. Merritt shall have the privelege of making sight drafts
46 through bank on the said Standard Oil Co. for twenty-five (25)

dollars per thousand heading, accompanied by duplicate bill of lading signed by railroad company as evidence of shipment of cars on which drafts are made. It is further agreed that cars shall be so loaded as to have a net value in Cleveland of amount of draft after culling & paying freight.

Lapeer, Michigan, October 4th, 1873.

J. J. MERRITT.
STANDARD OIL CO.,
Per S. H. COOK.

And whereas afterwards, to wit, on the 4th day of January, A. D. 1874, the said John J. Merritt sold and assigned one-half interest of said contract made & executed between the parties as aforesaid to one Henry Helme; which said assignment is in words and figures as follows, to wit:

For value received I hereby sell, transfer, and assign to Henry Helme, of Bay City, Michigan, one-half interest in a certain contract hereto annexed, executed by & between myself, of the first part, & The Standard Oil Company of Cleveland, Ohio, party of the second part, dated October 4th, 1873, whereby I have agreed to deliver to said company two million oil-bbl. heading.

In witness whereof I have hereunto set my hand and seal this 13th day of January, 1874.

J. J. MERRITT. [SEAL.]

47 And whereas afterwards, to wit, on the 1st day of April, 1874, the said John J. Merritt and Henry Helme, doing business under the firm-name and style of J. J. Merritt & Co., entered into a contract in writing with said defendant, which said contract was duly signed & executed by J. J. Merritt & Co., as party of one part, and the said defendant, as party of the other part, in which said contract he, said J. J. Merritt, & Henry Helme, proposed to assume and continue the contract made with the said John J. Merritt and the said defendant, dated October 4th, 1873, as above set forth, and is in words and figures as follows, to wit:

Whereas a certain contract was made & entered into on the 4th day of October, 1873, by & between J. J. Merritt, of Lapeer, Lapeer County, Michigan, of the first part, and the Standard Oil Co. of Cleveland, Ohio, of the second part, relating to the sale and delivery of two million (2,000,000) white-oak heading, which contract J. J. Merritt, of Lapeer, Michigan, & Henry Helme, of Bay City, Mich., comprising the firm of J. J. Merritt & Co., propose to assume and continue subject to the modification hereinafter mentioned; and whereas it is for the accommodation of said J. J. Merritt & Co. that they receive certain advances upon said heading before the time agreed upon in said contract, & they having requested the same: Now, therefore, it is agreed by & between the said firms of J. J. Merritt & Co., as party of the first
48 part, and said Standard Oil Co., as party of the second part, as follows, to wit: Said first party agrees to make and deliver to said second party the heading (not yet delivered), according to the terms of said contract properly piled in some suitable & convenient place to be agreed upon by said parties, on land in Lapeer, in said Lapeer County, controlled by said second party. The delivery to be made as fast as sawed by said first party. Said second parties are to furnish a man to count as nearly as may be said heading from week to week as

the same is piled, which will require one-half day each week; the other 5½ days in each week the said first parties are to furnish said man employment about said heading business, at full, fair wages, so as to keep said man employed all the time at a fair remuneration; provided that second party may furnish employment for said man, & shall be entitled to his services whenever they need him; balance of time to be employed by first parties. When said heading shall be piled and counted said counter shall give the first parties a certificate of the amount piled since any former count, but such certificate shall not be considered as final, it being fully understood & agreed that said counter is not employed as an inspector, but that his duties are confined to obtaining as nearly as may be possible an approximate estimate of the heading thus piled,
49 for the purpose of determining from time to time the amount of advances the first party shall be entitled to receive as stipulation herein. Whereupon the delivery of said heading so counted shall be deemed complete, & said heading shall then become and thenceforth be the property of second party, absolutely and unconditionally; & upon the presentation of such certificate of count at the office of said party in Cleveland, Ohio, said second party agrees to pay upon the heading so as aforesaid delivered and counted the sum of twenty dollars per thousand heading, by draft on New York. It is further agreed that, as the agent of second party, said first party shall, on or before the first day of July, A. D. 1874, begin to draw, ship, and forward said heading, and continue to draw, ship, and forward the same at the rate of not less than 100 M per month thereafter, to second party, at the place, in the manner, and upon the terms agreed upon in said contract, at their own expense, it being mutually agreed that any and all heading that may be piled up by said first parties shall be allowed to stand three months before the second party shall have the privilege of calling for the shipment of the same, and the second party have the privilege of insisting upon any heading that may have been piled being
50 allowed to remain piled five months before its shipment.

The second party also has the privilege at any time of calling upon the first party to go on and make the shipments direct from the saw, as agreed in original contract and it is further agreed; that in and after the 1st day of November, 1874, the first parties are to have the privilege of shipping direct from the saw, it being understood that the intention of all parties is to have the delivery of the whole two million of heading completed by the first of March, 1875. Second party agrees to pay the first party the balance of the contract price of said heading, as stipulated in said contract; provided, however, that there shall be deducted therefrom interest at 10% per annum in the advances of twenty dollars per M made as aforesaid from time to time paid till heading shall be received at Cleveland aforesaid, as per terms of said contract; also all sums which second party may have paid for insuring said heading against loss by fire, after delivery of same to it at Lapeer as aforesaid & which insurance said first parties hereby authorize and request second party to obtain, to the amount of twenty-one dollars per M; & provided further, that if the said heading shall be destroyed by fire before the delivery at Cleveland the loss above said twenty-one dollars per M shall fall upon first parties; and it is further
51 agreed that if first parties should fail to draw, ship, and forward to second parties at Cleveland the heading aforesaid at the time and in the manner provided in this contract and in the contract to which this is supplementary, then in this case second party is authorized to do it, and to deduct all the expense of every kind which shall

attend the doing of it from the balance of the contract price of said heading, and shall also deduct said 10% interest on advances, & all advances and insurance premiums, & should any balance of said contract price then remain second parties are to pay it to first parties, but should the sum exceed the contract price the first party shall on demand pay second party such excess. All the provisions of the contract first above referred to in regard to specifications, delivery, price, inspection, culling, and all other things not expressly charged by this contract, are to remain in force, this being a modification of said contract in regard to the particulars herein expressly stated & made for the benefit & at the request of first parties, & for no other purpose.

In witness whereof said parties have signed their names hereto this first day of April, A. D. 1874.

J. J. MERRITT & CO.
STANDARD OIL COMPANY,
By A. M. McGREGOR.

52 It is mutually agreed that the advances shall be twenty-five (25) dollars per M in the first million of heading, instead of twenty (20) dollars as provided above.

J. J. MERRITT & CO.
J. J. M.
STANDARD OIL CO.
By A. M. McGREGOR.

And whereas afterward, to wit, on the 29th day of May, A. D. 1874, the said John J. Merritt & Henry Helme, doing business under the firm-name of J. J. Merritt & Co., made another contract, as a modification of the contract dated October 4th, 1873, & April 1st, 1874, which was duly signed and executed by the said J. J. Merritt & Co., as party of one part, & by the defendant, as party of the other part, & is in words and figures as follows, to wit:

"And whereas since making the foregoing contracts dated October 4th, 1873, & April 1st, 1874, & since the latter date, & through an error made by the inspector employed by said Standard Oil Company, the said J. J. Merritt & Co. have received from the said Standard Oil Company money in excess of the amount said Merritt & Co. were entitled under said contracts to receive, which excess amounts in round numbers to the sum of twenty-five hundred dollars; and whereas said Merritt & Co. are legally bound to refund to said Standard
53 Oil Company without delay said twenty-five hundred dollars; and whereas such repayment, at this time, would greatly inconvenience said J. J. Merritt & Co., thereupon this agreement, made at the earnest request and solely for the accommodation of the said J. J. Merritt & Co., party of the first part, and the Standard Oil Co. of Cleveland, O., party of the second part, witnesseth: The Standard Oil Company hereby consents to extend the time of repayment of said twenty-five hundred dollars for the period of ninety days from the date hereof upon the following terms and conditions, to wit: Said J. J. Merritt & Co. shall execute to said Standard Oil Co. their note, secured by mortgage, for said sum of twenty-five hundred dollars, dated May 29th, 1874, due in ninety days, with interest at 10%, which they hereby agree to pay with interest, as agreed, at its maturity. In consideration of said extension the party of the first part hereby agrees to and with the party of the second part as follows: That said first party shall, upon the re-

quest of said second party, extend the period for holding the heading named in the aforesaid contracts from five months to eight months; all other terms and conditions of said contracts not inconsistent with this agreement remaining unchanged. In the event said second
54 party shall so elect, it shall also have the right to extend said storage period beyond the eight months a further period, viz, until April 15th, 1875; provided, however, that if such privilege is claimed by said second party it shall release said first party from the payment of interest and expense of insurance after the expiration of said period of eight months; but if, through any unfor'seen cause, and not at the request of said second party, the shipment of said heading is delayed beyond said period of eight months, then in that event said first party shall pay to said second party interest, as already agreed, &, in addition thereto, shall, at their own cost, continue to pay cost of insurance, as heretofore provided.

Cleveland, Ohio, May 29th, 1874.

J. J. MERRITT & CO.
STANDARD OIL CO.,
By A. M. McGREGOR.

And whereas afterwards, to wit, on the 28th day of August, A. D. 1874, the said John J. Merritt & Henry Helme, doing business under the firm-name & style of J. J. Merritt & Co., made another contract, as a modification of the foregoing contracts dated October 4th, 1873, April 1st, 1874, & on May 29th, 1874, which said contract was duly signed and executed by the said J. J. Merritt & Co., as party of the one part, and the said defendant, as party of the other part, & is in words
55 & figures as follows, to wit:

And whereas since making the foregoing contracts dated October 4th, 1873, April 1st, 1874, and on May 29th, 1874, and whereas the amount of advances of twenty dollars per thousand pieces of heading, as agreed in the supplementary contract of April 1st, 1874, is deemed insufficient by the said J. J. Merritt & Co., therefore this agreement, made at the earnest request and solely for the accommodation of said J. J. Merritt, party of the first part, and the Standard Oil Co., of Cleveland, Ohio, party of the second part, witnesseth, the Standard Oil Co. hereby agrees to advance the sum of twenty-five dollars ($25) per thousand pieces on the second million of heading, as provided in supplementary contract.

On consideration of the said increase in the amount advanced the party of the first part hereby agrees to and with the party of the second part as follows: That said first party shall, upon the request of said second party, extend the period for holding the heading named in the aforesaid contracts from five months to six months, all other terms and conditions of said contracts not inconsistent with this agreement remaining unchanged. In the event said second party shall so elect, it shall also have the right to extend the said storage period beyond the six months a further period, viz, until August 1st, 1875; pro-
56 vided, however, that if such privilege is claimed by said second party it shall release said *said* first party from the payment of interest after the expiration of said period of six months; but if, through any unfor'seen cause, and not at the request of said second party, the shipment of said heading is delayed beyond said period of six months, then, in that event, said first party shall pay to second party interest, as already agreed. It is further agreed by the first party that if not requested at an earlier date by the second party they will load and for-

ward the second million of heading during the period extending from August 1st, 1875, to January 1st, 1876, & said first party shall, at their own cost, continue to pay cost of insurance for the above period, as heretofore provided.

In witness whereof said parties have signed their names hereto this 28th day of August, A. D. 1874.

J. J. MERRITT & CO.
STANDARD OIL CO.,
By A. M. McGREGOR.

And whereas the said John J. Merritt & Henry Helme, doing business under the firm-name and style of J. J. Merritt & Co., after the making and executing the said contracts hereinbefore described & set forth, did saw, sell, and deliver to the said defendants a large amount of heading, to wit, three million pieces according to the tenor or effect, the said several contracts as aforesaid, which were of great value, to wit, of the value of one hundred and twenty thousand dollars, by reason of which sale and delivery of the heading as aforesaid to the said defendant the said defendant became indebted & was liable to pay the said John J. Merritt & Henry Helme the sum of one hundred and twenty thousand dollars therefor. And that afterwards, to wit, on the 8' day of January, 1876, the said John J. Merritt & Henry Helme, sold and assigned said cause of action to the said plaintiff for a good and valuable consideration, by reason whereof and by force of the statute in such case made and provided the said defendant then and there became liable to pay to the said plaintiff the sum of money due on said contracts to the said John J. Merritt and John J. Merritt & Henry Helme therein specified, according to the tenor and effect thereof; and being so liable to the said plaintiff, the said defendant afterwards, to wit, at the city of Flint, in said eastern district of Michigan, on the day and year aforesaid, undertook and promised the plaintiff to pay him the said sum of money in the said contracts specified, according to the tenor and effect thereof; yet the said defendant has disregarded its said promises, and has not (although often requested so to do) paid any portion of the money due him, by reason of which actings and doings, & the refusal of the said defendant to pay as by the terms of said contracts the defendant had agreed to do, the said plaintiff has sustained great damages, to wit, twenty thousand dollars; and for that whereas, on the eighth day of January, A. D. 1876, at the district aforesaid, was indebted to the plaintiff in the sum of ten thousand dollars for the price and value of goods, and there sold and delivered by John J. Merritt & Henry Helme to the defendant at its request, and the demand afterward assigned to said plaintiff.

And in a like sum for the price and value of work then and there done and materials for the same provided by John J. Merritt & Henry Helme for the defendant at its request, and the demand afterwards assigned to said plaintiff.

And in a like sum for money then and there lent by John J. Merritt & Henry Helme to the defendant at its request, and the demand afterwards assigned to said plaintiff.

And in a like sum for money then & there paid by John J. Merritt & Henry Helme for the use of the defendant at its request, and the demand afterwards assigned to said plaintiff.

And in a like sum for money then and there received by the defendant for the use of the plaintiff.

And in a like sum for money found to be due from the defendant

to John J. Merritt & Henry Helme, on an account then and there stated between them, and the demand afterwards assigned to said plaintiff.

And whereas the defendant afterwards, to wit, on the day and year aforesaid, in consideration of the premises, respectively, then & there promised the plaintiff to pay him the said several sums of money, respectively, on request; yet the defendant has disregarded its said promises, and has not (although often requested so to do) paid any of the said sums of money or any part thereof, to the plaintiff's damage twenty thousand dollars, and therefore he brings suit, etc.

GASKELL & GEER,
Plaintiff's Attorneys.

60 Afterwards, to wit, on the 19th day of May, A. D. 1876, said defendant, by his said attorneys, came into said court and filed its plea to said declaration, together with a notice of set off, in the words and figures following, to wit:

Plea & notice.

UNITED STATES OF AMERICA:

The circuit court of the United States for the eastern district of Michgan, ss.

THE STANDARD OIL COMPANY OF CLEVELAND, OHIO, *ads.* GEORGE H. VAN ETTEN.

The defendant, The Standard Oil Company of Cleveland, Ohio, by Griffin & Dickinson, attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

GRIFFIN & DICKINSON,
Attorneys for Defendant.

Please to take notice that the said defendant will on the trial of this cause insist upon and give in evidence under the general issue above pleaded that said claim for which suit is brought is held by said plaintiff subject to all the equities and set-off existing between the original owners of the same and this defendant, and that said
61 original owners were John J. Merritt and Henry Helme; that before and at the time of the commencement of this suit and before said assignment the said John C. Merritt Helme were and still are indebted to the said defendant in the sum of one hundred thousand dollars for the price and value of goods before then sold and delivered by the defendant to said John J. Merritt and Henry Helme at their request, and in a like sum for the price and value of work then done and materials for the same provided by the defendant for said John J. Merritt and Henry Helme at their request;

And in a like sum for the price and value of work then done by the defendant by the said John J. Merritt and Henry Helme at their request;

And in a like sum for the money then lent by the defendant to said John J. Merritt and Henry Helme at their request;

And in a like sum for money then paid by the defendant for the said John J. Merritt and Henry Helme at their request;

And in a like sum for money then received by the said John J. Merritt and Henry Helme for the use of the defendant;

And in a like sum for money then found to be due from the said John J. Merritt and Henry Helme to the defendant on an account stated between them;

And in a like sum for the use of money then due from the said
62 John J. Merritt and Henry Helme to the defendant;

And by the defendant for same to the said John J. Merritt and Henry Helme at their request;

Which said several sums of money, or so much thereof as shall be sufficient for that purpose, the said defendant will set off and allow to the plaintiff against any demand or demands of said plaintiff to be proved by himon said trial, and have the balance certified in its favor.

Dated the 19th day of May, 1876.

Yours, &c.,

GRIFFIN & DICKINSON,
Attorney' for Defendant.

To Messrs. GASKELL & GEER,
Attorneys for Plaintiff.

(Endorsed:) Filed May 19, '76. A. Mandell, cl'k.

63, 64 Therefore, to try the issue above joined, let a jury come thereof, by whom &c., who neither, &c., because as well the said plaintiff as the said defendant have put themselves on that jury.

And the jurors of that jury, of whom mention is made, to wit, Solomon Parsons, Daniel M. Graham, Howard Hopkins, Moses W. Barker, Oliver M. Lond, William A. Root, John Houston, Martin Gray, Ammiel Robbins, T. Scott Clark, John F. Drew, and Thomas Linn, who were, on the 21st day of March, A. D. 1879, elected, tried, and sworn to try the issue joined in this case, and after hearing the arguments of counsel and receiving the charge of the court, said jury say they have not agreed upon a verdict, and that there is no probability of their being able to agree; and thereupon said jury were discharged from further consideration of the case.

Afterwards, to wit, on the 9th day of April, A. D. 1877, on motion of plaintiff, by his said attorneys, an order was entered in said cause in open court in the words following, to wit:

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

On reading and filing affidavit in this cause, and, on motion
65 of plaintiff, by Mr. Crofoot, his counsel, for leave to amend said plaintiff's declaration, it is ordered that said plaintiff have leave to amend his declaration, filed in this cause, by changing the ad damnum from ten thousand dollars to twenty thousand dollars.

Therefore, to try this issue above joined, let a new jury come thereof, by whom, &c., who neither, &c., because as well the said plaintiff as the said defendant have put themselves upon that jury.

And the jurors of that jury, of whom mention is made, to wit, John C. Waterbury, Samuel Bigelow, George Renwick, Jefferson J. Wilder, Thomas Symonds, Eliakim R. Blakeslee, Stephen C. Baker, Walter Wood, Edward S. Hunt, James F. Hurst, William Rhodes, and Jacob

Kincaid, who were, on the fifteenth day of September, A. D. 1877, elected, tried, and sworn well and truly to try the issue joined between the parties aforesaid, and after hearing the evidence adduced and the arguments of counsel on either side, and receiving the charge of the court, returned to their room to consult of their verdict, in charge of an officer sworn to attend them; and after being a short time absent said jury returned into court, and after being enquired of concerning their verdict say they find that said defendant did undertake and promise, in manner and form as said plaintiff hath in his declara-
66 tion alleged against them, and on occasion thereof assess the plaintiff's damages against the said defendant at the sum of seven thousand six hundred and eighty-eight dollars ($7,688).

It is, therefore, considered by the court now here that the said plaintiff do recover against the said defendant the said sum of seven thousand six hundred and eighty-eight dollars ($7,688) damages assessed as aforesaid, together with said plaintiff's cost, of this suit to be taxed, &c.

Sept. 24, 1877.

And thereupon, on motion of defendant, by Mr. Griffin, its counsel, it was ordered by said court that said defendant have sixty days in which to file a bill of exceptions in this cause, or, if he shall so elect, thirty days in which to move for a new trial in said cause.

And afterwards, and upon application to the court, orders were entered in said cause extending time to settle bill of exceptions from time time until the same was settled, as hereinafter stated.

(It is not deemed important to extend the record by setting forth said orders in full.)

Afterwards, to wit, on the 6th day of November, A. D. 1877, come Griffin & Dickinson, attorneys for said defendant, and caused to be entered and filed in said cause a motion for a new trial thereof; which motion is in the words and figures following, to wit:

67 In the circuit court of the United States for the eastern district of Michigan.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio.

Now comes the said defendant, by Griffin & Dickinson, its attorneys, and moves the court that the verdict in said cause be set aside and a new trial granted, for reasons as follows, to wit:

1. The court erroneously instructed the jury on the questions of account stated.
2. The court erroneously instructed the jury on the questions of delivery under the contract.
3. The court erroneously instructed the jury on the questions of the responsibility of the parties after the shipment at Lapeer.
4. The court erroneously instructed the jury upon the questions of the alleged fraudulent count at Cleveland.
5. The court erroneously instructed the jury that they were at liberty to find a verdict for any amount.

6. The verdict was against the weight of evidence.

7. There was no evidence in said cause by which the verdict can be sustained.

Because of the—

8. Newly-discovered evidence of the witnesses, Seaman H.
68 Edgerton, James A. Wadsworth, Walter *Walter* W. Graham, David Eugene Lacy, William Walbridge, Edward McCarthy, James Loughnane, Nelson McDonald, Colic McDonald, & William Graham.

Said motion will be based on the files and records of the proceedings in said cause and upon affidavits, with copies of which you are herewith served.

GRIFFIN & DICKINSON,
Att'ys for Defendant.

Afterwards, to wit, on the 6th day of November, A. D. 1877, the following entry was made in the journal of said court in the said cause, to wit:

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio. } 5874.

The motion of defendant for a new trial of this cause now coming on to be heard is argued *is argued* by counsel for the respective parties, and submitted for decision.

69 Afterwards, to wit, on the 12th day of November, A. D. 1877, an order overruling said motion for new trial was entered in said cause, in the words following, to wit:

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY OF CLEVELAND, Ohio. } 5874.

The motion of defendant for a new trial of this cause having been heretofore argued & submitted, and the same having been duly considered, it is now by the court here ordered that said motion be, and the same is hereby, overruled and denied.

70 The circuit court of the United States for the eastern district of Michigan.

GEORGE H. VAN ETTEN
vs.
THE STANDARD OIL COMPANY, OF CLEVELAND, Ohio.

Bill of exceptions.

At a session of said court, held at the court-room in the city of Detroit, in the month of September, 1877, before the Hon. Henry B. Brown, judge of the court aforesaid, the issue joined between the parties in this cause came on to be tried by a jury duly empaneled.

Thereupon counsel for plaintiff, to maintain the issue on his part, read in evidence a certain contract and four certain other contracts modifying said contract, being the same contracts copies of which are set out in the plaintiff's declaration. The contracts were marked on the trial, for identification, Schedules A, B, C, D, and E, respectively.

Counsel for plaintiff then gave in evidence an assignment of the one-half interest in Schedule A to one Henry Helme, dated July 13, 1874, and also an assignment of the remaining half interest in said contract to said Helme, dated July 19th, 1875; also an assignment dated Jan. 8, 1876, by said Helme to plaintiff of his entire right, title, and interest under said contracts hereinbefore named.

Counsel for plaintiff then gave evidence tending to show that the assignors of the plaintiff commenced the manufacture of said heading and manufactured the most of it in 1874, and that after it was
71 manufactured it was piled up on each side of the railroad track so as to be accessible for shipping. The heading manufactured in 1874 remained on each side of the track so piled until they were afterwards shipped.

That said heading was piled upon lands that had been leased by the defendant after the modification of the contract by which the heading was to be so piled.

Plaintiff then gave evidence tending to show that one H. Coulter took the contract of loading said heading upon the cars for shipment, and that the assignors of the plaintiff commenced the shipment of said heading by rail in May, 1875, and continued to ship said heading until some time in August of the same year.

That said Coulter, with boys and men in his employ, proceeded to load the said heading upon the cars obtained for that purpose by handing them in when near enough, and wheeling them to the cars when not near enough to hand in, and as they were handed in they were laid up in piles and counted in the piles four or five together, as the case might be, until one hundred pieces were placed in the car, and then a mark was made on the inside of the car, and when five hundred had been thus placed a cross-mark was made, and thus the tally was kept of the number of pieces loaded in each car. That the loading and shipment of the cars was under the direction and superintendence of James Innes, employed for that purpose, who kept an account of each car loaded, of the number of the car, the line to which it belonged, and the number of pieces in each car, and that the number so kept by him was 391 car-loads, and all contained 2,691,660 pieces. That he kept the count from day to day as the cars were shipped in a book
72 which he produced in court and from which he gave the number of cars and the number of pieces in each car and the total number.

The plaintiff also gave evidence tending to show that the persons who loaded the cars counted the same accurately and kept a correct tally thereof, and at the conclusion of the loading of each car reported the same to Innes, who then made the entry in his book, and thus the account of the shipments from Lapeer was kept.

The plaintiff offered in evidence bills upon company's blank forms which the assignors of the plaintiff had received from the defendants of the first four car-loads sent through by rail, the first of which is in the words and figures following:

OFFICE OF STANDARD OIL COMPANY,
Cleveland, Ohio, May 24th, 1875.

[Address: Room 3, Standard Block. Shipper, J. J. Merritt & Co. Inspection report on your shipment heading No. 9390, car No. 1387, D. Journal folio, 141.

Car initial.	Heading.	Culls.	Total.	Price.	Amount.	Freight.
1387 D	4,132	115	Freight	40	165 28 55 91 109 37	55 91

Kind of heading, 1–2, D. S. W. O.
Faults with culls, knots, rotten, cat-faces, twin, short.

STANDARD OIL COMPANY,
Per W.

73 The red ink represents the words in blanks, which are printed in red.*

*These words are indicated by lines underneath.—PRINTER.

The following reports were on similar blanks with spaces filled in correspondingly.

The following is all that is deemed material to insert, being the date and number of heading in successive order:

Date.	Car No. 1 initial.	Heading.	Culls
May 25	2048 D.	4,168	29
" "	2nd car. 288 D.	8,932	60
" "	3rd car. 1176 D.	3,936	85

The said Henry Helme being upon the witness-stand gave evidence tending to show that after these four car-loads had been shipped through by rail an arrangement was made by which the rest of the heading was to be shipped from Lapeer to Detroit by rail, a distance of 60 miles, and from thence by vessel to Cleveland.

That one cargo containing 81,914 of net heading and 632 culls had been shipped from Lapeer and loaded upon the schooner Maid of the Mist, a bill of which was returned by the defendant to the assignors of the plaintiff, dated June 12th, 1875, and is in the words and figures following:

OFFICE STANDARD OIL COMPANY,
Cleveland, Ohio, June 13th, 1875.

[Address: Room 8, Standard Block; shipper, J. J. Merritt & Co. Inspection report on your shipment heading No. , via rail from Lapeer to Detroit, schooner Maid of the Mist from Detroit to Clevel: nd. Journal folio, 159. Car No. .

74 Car No. initial.	Heading.	Culls.	Total.	Price.	Amount.	Freight.
	81,914	 632	Freight	40	3,276 56 528 98	528 98
					2,747 58	
			Dockage and teaming, $4.50 per M.		122 87	
			Net credit	.....	2,624 71	

Kind of heading, D. S. W. O.
Faults with culls, split knotty streaks.

STANDARD OIL CO.,
Per W.

That after the return of the bills for the four car-loads and before the return of the bill for the first cargo Thomas H. Wheeler, the agent of the defendant, being at Lapeer, told me they had only culled one cargo. It did not pay them to cull; didn't find culls enough to pay them for handling in Cleveland, and if we would continue to cull the same they would not cull any more. We talked about inspection, and he said if we continued to cull the same the balance of the heading should run as the first four cargoes did for matched heading. I assented to that and we agreed that this course should be taken. The Maid of the Mist carried the first cargo that was inspected and in which the number of culls was reported. No culls were reported in the other cargoes.

The witness h'ving stated that subsequent to this date of the agreement with Wheeler he was at Lapeer occasionally and saw them loading the cars with the heading, was asked:

Q. State how the heading you saw there compared with that which was shipped on the Maid of the Mist, in your opinion.

(To which question defendant's counsel objected as incompetent and irrelevant. The court overruled the objection, and to such ruling the defendant's counsel excepted.)

75 A. So far as my opinion is concerned the heading averaged about the same all the way through.

Q. How long have you been in the business?

A. This is the only heading business I ever transacted. No, it is not, either; I have been in the heading business since the year before that.

Q. Can you explain to the jurors fully what matching is?

(To which question defendant's counsel objected as incompetent and immaterial. The court overruled the objection, to which ruling defendant's counsel excepted.)

A. A piece of the heading is supposed to be half a head. A head is 22 inches in diameter. If it takes three pieces to make the 22 inches in diameter, that counts two pieces. If it take four pieces, that counts

two. If it takes two, it counts two. Whatever it takes to make a head counts as two pieces.

The witness having stated that before the agreement made with Wheeler four cargoes had been shipped; that according to Innes's report to him there were in the first four cargoes shipped after the four car-loads 378,066 pieces and 58 cars, was asked:

Q. Have you made an estimate by taking the remaining number of cars and comparing them to these? And if they would run the same as the first four cargoes how many ought there to have been of matched heading?

(To which question defendant's counsel objected as incompe-
76 tent and irrelevant. The court overruled the objection, to which ruling defendant's counsel excepted.)

A. There were 878,066 pieces on the first four cargoes. They returned 283,986 of matched heading,. Taking the whole number of pieces at the same proportion it would give us a total of 2,021,842 of matched heading; and they returned us exactly 1,758,539, making a difference of 263,303 matched heading, which at $40.00 a thousand would be $10,532.12. In this I have not computed anything for the extra dollar a thousand.

Upon cross-examination of said witness by defendant's counsel said witness was shown certain letters purporting to be signed by him and certain other letters written in reply thereto purporting to be signed by the Standard Oil Company, by A. M. McGregor, which were by the witness admitted to be genuine and to have been signed and received by him. It appeared in evidence that A. M. McGregor was the general manager of the defendant, a corporation at Cleveland, and that T. H. Wheeler was the general purchasing agent of the defendant, and accustomed to travel more or less looking after the business of the defendant in purchasing supplies and acting in the interest of the company in the matter of their contracts.

Said letters, having been identified and admitted to be correct, were by the said defendant read in evidence, and are as follows:

BAY CITY, *July 12th*, 1875.

A. M. MCGREGOR, Esq., *Cleveland:*

DEAR SIR: Mr. Wheeler's sudden return left our business a little unsettled, but I think he has seen enough to satisfy him that it
77 is safe and proper to make me the advance of $5.50 per car of heading as shipped, and trust that the first instalment will reach me this week.

Yours, truly,

H. HELME.

On July 13th, 1875, defendant replied to the matter ommitted in the foregoing letter and not important here. To the portion of the letter above set forth defendant replied as follows:

CLEVELAND, OHIO, *July 14th*, 1875.

H. HELME, Esq., *Bay City, Michigan:*

DEAR SIR: Enclosed please find our draft No. 3238 on N. Y. for $792 to the order of J. J. Merritt & Company, the same being on advance of $5.50 per car on 144 cars on which we have paid freight from Lapeer to Detroit. You are not to consider this as establishing a precedent. We may or may not make a similar advance in the fu-

ture. Circumstances that may arise will determine us. Please acknowledge receipt of draft, and oblige,

Yours, truly,

STANDARD OIL CO.

A. M. McGREGOR.
G. H. Q.

BAY CITY, *July 15th*, 1877.

A. M. McGREGOR, Esq., *Cleveland:*

DEAR SIR: * * * * Am getting the heading off as
78 fast as expected, and hope to receive a remittance from you this week to enable me to pay men. I have made no arrangements for money yet and will not until I hear from you.

Yours, truly,

H. HELME.

BAY CITY, *July 18th*, 1875.

A. M. McGREGOR, Esq., *Cleveland:*

DEAR SIR: * * * * * *

We had 230 cars loaded with heading up to last night, and will get off 60 more this week.

Merritt talks of going to Cleveland this week. Do not pay anything on account of J. J. Merritt & Co.

Yours, truly,

H. HELME.

BAY CITY, *July 25th*, 1877.

A. M. McGREGOR, Esq., *Cleveland:*

DEAR SIR: I have finished loading the heading on east side of track, 282 cars in all; shall commence on the other Monday morning; will have it all off inside of three weeks, if the legal troubles from J. J. and A. E. Merritt's business do not interfere with me. * * * * * * I should think it is now safe for you to pay me some more money, more than the $5.50 per car spoken of when I saw you. The amount
79 advanced by you on the heading yet to ship cannot exceed $10,000, which is considerably less, probably $5,000, than $25.00 per thousand. I am pretty hard pressed to get along, and trust you will make me a remittance by return mail of as much as you safely can.

Yours, truly,

H. HELME.

The omitted matter in the foregoing letters represented by stars relate to transactions other than those pertaining to the controversy in suit.

To which defendant replied:

CLEVELAND, OHIO, *July 27th*, 1875.

H. HELME, Esq., *Bay City, Michigan:*

DEAR SIR: Your favor of the 25th at hand and contents noted. We will decide in regard to the matter you mention on Mr. Wheeler's return from Lapeer.

Yours, truly,

STANDARD OIL COMPANY.
AM. M. McGREGOR.
G. H. Q.

BAY CITY, *August 7th*, 1877.

A. M. MCGREGOR, Esq., *Cleveland:*

DEAR SIR: I have shipped from Lapeer to Aug. 6th 365 cars of heading, and have B. of L. for 329 cars shipped from Detroit;
80 will be done by Wednesday next. I notice that the amount per car by your inspection reports is dropping a little, though the cars are loaded heavier than in the first shipped, but averaging the cars not inspected by those we have reports from, the 329 cars shipped from Detroit will just about balance our account. Another vessel will probably clear to-day with over 20 cars. Taking it all around, I think you ought to send me some money by return mail. My creditors are very troublesome, and the difficulties of J. J. and A. E. Merritt make them more urgent than they otherwise would. I do not know that I am asking too much under the circumstances.

Yours, truly,

H. HELME.

To which defendant replies:

CLEVELAND, O., *August 9th.*

H. HELME, Esq., *Bay City, Michigan:*

DEAR SIR: Your favor of the 7th at hand and contents noted. Enclosed please find our draft 3448 on N. Y., to the order of J. J. Merritt and Company for $385.00, the same being on advance of $5.50 per car on 70 cars. We do not feel like making any more advances, the $1,000 remittance to be made you on August 15th excepted, until the stock is all in and inspected. We are inspecting your stock with all the despatch possible, and shall continue to do so, and as soon as possible after it is all in we will figure up and remit you balance, your due.

Yours, truly,

STANDARD OIL COMPANY.
A. MCGREGOR.
G. H. Q.

81 CLEVELAND, O., *August 14th*, 1875.

H. HELME, Esq., *Bay City, Michigan:*

DEAR SIR: Enclosed please find our draft No. 3485 on N. Y., for $1,000, to order J. J. Merritt & Co., advance on account; also draft number 3491, for $247.50, the same being on advance of $5.50 per car on 45 cars. Please acknowledge receipt of drafts and oblige,

Yours, truly,

STANDARD OIL COMPANY.
A. M. MCGREGOR.
G. H. Q.

BAY CITY, MICHIGAN, *August 16th*, 1875.

A. M. MCGREGOR, Esq., *Cleveland, O.:*

DEAR SIR: Your favor of the 14th inst., enclosing drafts for $1,000 and $247.57, is received. The heading is all shipped; but one car left at Detroit, which will have to go with some of the Merritt staves; wish you to inspect and send the reports of the amount received. It is very necessary to me that it be done this month, as I have further payments to make September 1st, and if there is anything coming from the Standard Oil Company I shall need it badly.

Yours, truly,

H. HELME.

To which defendant replied as follows:

82 CLEVELAND, O., *August 20th*, 1875.

H. HELME, Esq.,
Bay City, Michigan:

DEAR SIR: Enclosed please find statement of J. J. Merritt & Co., acc't to date, showing balance due of $542.54, for which we enclose our draft No. 3520, on New York, to their order for like amount. Please acknowledge receipt of draft and oblige

Yours, truly,

STANDARD OIL COMPANY.
A. M. McGREGOR.
G. H. Q.

A copy of statement enclosed in said letter is attached to this bill of exceptions, and marked Schedule F.

BAY CITY, *September 21st*, 1875.

A. M. McGREGOR, *Cleveland:*

DEAR SIR: I shipped you on September 3rd, from Detroit, one car of heading. It is time it was culled. Please remit the proceeds and oblige

Yours, truly,

H. HELME.

To which defendant replied as follows:

CLEVELAND, O., *September 25th*, 1875.

H. HELME, 'sq., Ag't,
Bay City, Michigan:

DEAR SIR: Enclosed please find our draft No. 3820, on New York, to order of J. J. Merritt & Co., for $130.82, as per statement
83 below:

Net proceeds heading carried by sch'r Wellhouse, report enclosed	$131 29
632 cull heading, at $13.56 per M	8 53
Total	139 82

Please acknowledge receipt of draft and oblige

Yours, truly,

STANDARD OIL COMPANY.
A. M. McGREGOR.
Q.

BAY CITY, *September 28th*, 1875.

A. M. McGREGOR, Esq., *Cleveland:*

DEAR SIR: Your favpr of the 25th instant enclosing New York draft $139.82 is received.

Yours, truly,

H. HELME.

Witness, upon being further interrogated, testified that upon receipt of the statement marked Schedule F he made no objections thereto, and had not at any time made any objections thereto, to the defendant,

either verbally or by letter, nor to the statement contained in the final letter of September 25th, 1875.

It was here conceived that between Cleveland and Lapeer there was a daily mail, leaving Lapeer one day and arriving at Cleveland on the next.

84 Witness continued: That he was last in Cleveland, at the company's place of business, in August, 1875; that he saw Mr. McGregor; that he said nothing to him about the inaccuracy or incorrectness of the returns; that he said nothing about the accounts not being correct.

Question by defendant's counsel:

Q. You had facilities in your power to figure on it?

A. Yes, sir; but I never did it.

Q. And didn't he also give you a statement of the number of car-loads on each boat?

A. Yes, sir; each bill of lading stated so many car-loads of heading.

Q. And gave you the name of the boat?

A. Yes, sir. We received bills of lading of S. W. Thompson, junior, of Detroit. We knew the number of cars that went on each vessel by the bills of lading. So we knew the whole number of cars shipped from Detroit.

Upon re-examination he stated that previous to writing the letter dated August 7th, 1875, he had figured occasional cargoes upon the returns furnished by the defendant corporation, and knew that they were not holding out as they ought to.

85 Upon re-examination said Helme testified that the said company had never reported to him any gross count of the pieces received by it, and that he never had any knowledge of the number of gross pieces which defendant made by its count in Cleveland until it was given in court upon the former trial, nor did the defendant ever notify him or give him any information in any manner as to how it was by its count matching the heading; that he had no information, until on the former trial of the case, how many gross pieces by its matching it took to make a head. He further stated that some time after the receipt of the bill giving the general statement of the count he became satisfied that the defendant had not accounted to him for nearly all the heading shipped.

Q. After you had received the bill what did you next do towards ascertaining its correctness, whether you had this bill prepared there by Innes?

A. We had that prepared (referring to the bill prepared by Innes).

Q. Did you have this prepared by Innes?

(Objected to by defendant's counsel as being incompetent and irrelevant. Objection overruled and defendant's counsel excepted.)

Q. What did you do then, after receiving that Exhibit F—defendant's statement of account?

A. I had a statement made of the whole number of cars and the number of pieces in each car.

Q. By whom?

A. By James Innes.

Q. About how soon after receiving that—defendant's account—should you say?

86 A. I should say probably it was a month; I could not say as to the time.

Q. You do not recollect distinctly?

A. No, sir. Soon afterwards.

Q. Did you ever see Wheeler after it was made, that you remember of, at Lapeer?

A. Not that I remember of.

Q. Did you see any of the members of the corporation or any of its proprietors or managers?

A. No, sir; none of them except here—meaning here in court.

Q. Did you see Mr. McGregor during that time?

A. No, sir.

Q. Will you tell the jury what you did with reference to taking advice of counsel to protect yourself?

(Objected to by defendant's counsel as incompetent and irreleva't. Objection overruled and to the ruling defendant's counsel excepted.)

A. I consulted with Mr. Geer, for one.

Q. State what else you did for the purpose of seeing whether the defendant had any property in Lapeer County.

(Objected to by defendant's counsel as incompetent and irrelevant. Objection overruled by the court, and to the ruling defendant's counsel excepted.)

A. Hadn't any that I could find then. I knew of their having property in Genesee County, in Flint, some heading they had bought
87 from Mr. Smith, and then Mr. Geer advised me to commence suit.

Q. Now, then, were there any officers or anybody connected with the company in this county? Explain, if you can, why you did not commence the suit before.

(To which defendant's counsel objected as incompetent and irrelevant. The court overruled the objection, and to the ruling defendant's counsel excepted.)

A. I never commenced the suit at all.

Q. What steps did you take?

(Same objection, ruling, and exception as last stated.)

A. I took no other steps than I have stated. Inquired frequently about the property; where I could commence and how I could commence.

Q. Did you make any inquiries to see whether they had any officers in this State?

A. No, sir; there were no officers that I knew of in this State.

One HUGH COULTER, before named, being upon the witness-stand, the plaintiff's counsel offered, among other things, to show by said witness the number of cars loaded by him at Lapeer and the count of the gross pieces of heading shipped at Lapeer.

(To which testimony defendant's counsel objected on the ground that the evidence was inadmissible until there had been some evidence of fraud or mistake in the count of matched heading by defendant. The court overruled the objection, and to the ruling of the court defendant's counsel excepted.)

The witness then testified that the total number of car-loads loaded under his direction was 383. He also gave further testimony
88 as to the total number of heading which was shipped and as to the condition and quality of the same, and as to the manner in which the first car-loads compared with the subsequent car-loads, and other evidence tending to maintain the count of the gross pieces of heading at 2,691,660 at Lapeer, as claimed by the plaintiff.

It also appeared that the witness had been in the employ of J. J.

Merritt & Co., in and about the work relating to said heading, up to the time that said Helme succeeded to the interest of his assignors under said contracts, from which time and at the time of the shipping and loading the witness was in the employ of said Helme.

On cross-examination the witness was asked by the defendant's counsel:

Q. You may state how much they owed you.

A. Mr. Van Etten did not owe me one cent.

Q. I do not mean Van Etten; I mean Mr. Helme and these other men who made the contract with you to do this work.

(To which question counsel for plaintiff objected as immaterial.)

Objection being overruled, counsel for the defendant asked the witness as follows:

Q. Now, sir, how much did Helme and Merritt owe you?

A. Mr. Helme owes me $177.00, I think; I took judgment for about that.

Q. Have you not recently stated to different parties in talking about them atter that you want them to recover here, because you would then get your pay.

(To which question plaintiff's counsel objected on the ground that defendant's counsel did not intimate the time and place.

To which the suggestion defendant's counsel replied: We do
89 not propose to impeach the witness. And thereupon the court sustained said objection.

And to the ruling and decision of the court defendant's counsel did then and there except.)

ROBERT GUMMERSON, one of the boys aforesaid named who assisted in loading the car, being upon the witness-stand on behalf of the plaintiff, testified that in loading the heading he was accurate in his counting; that he reported each car to Mr. Innes or Coulter; that it was continued with reference to the heading piled on the west side as well as on the east side; that Clarence Prastige and James Williams, two boys, were there aiding him when he commenced, and continued with him until he got through; that they were there when the shipping on the west side was stopped.

The witness was then asked:

Q. How would the heading average as far as the width was concerned on the east and west sides?

(To which question defendant's counsel objected as incompetent and irrelevant. The court overruled the objection, and to the ruling defendant's counsel excepted.)

A. They were about as good, I guess.

JAMES INNES, aforesaid named, being upon the witness-stand for the plaintiff, and having testified that he helped cull the heading, and that the heading on the west side was better than the heading on the east side, if there is any difference at all, and that the first heading that was shipped was the poorest heading with reference to
90 culls that was shipped at all, was asked:

Q. In your opinion, taking that heading, in the experience you have had in handling, manufacturing, and everything about it, what would you say would be a fair average of the width of the pieces?

(The question was objected to by defendant's counsel as incompetent and irrelevant. The objection was overruled by the court, and to the ruling defendant's counsel excepted.)

A. About 9 inches—that would take about 5 pieces to make 4—that is, about one-half two pieces and one-half three piece heading.

JOHN TAGGART being upon the witness stand for the plaintiff, having given other testimony, was asked:

Q. Have you had any experience in matching heading?

A. Yes, sir; matched a good deal of heading; did not match this heading, though.

Q. Had you had experience before that?

A. Yes, sir.

Q. Considerable?

A. Yes, sir.

Q. In your opinion, how would this heading (referring to the heading in controversy) run as to matching?

(To which *counsel* defendant's counsel objected, as incompetent and irrelevant. The court overruled the objection, and to the ruling defendant's counsel excepted.)

A. I should think about half two-piece and half three-piece heading.

91 Plaintiff then offered evidence tending to show that after the agreement with reference to the omission of the inspection of the heading at Cleveland, the said Helme directed his men and the inspectors to be careful and inspect as fairly and closely as they had done, and that he employed as inspectors John Taggart, Joseph Stockwell, Charles Gray, James Innes, and William Grumwell.

Joseph Stockwell, Gray, and Grumwell were sworn in addition to Innes and Taggart, and gave evidence tending to show that they did inspect the heading afterwards shipped as closely as before, and that the heading afterwards shipped ran as good and better than the heading that had been shipped before the time.

All of said witnesses testified that the pieces of heading averaged better in width and in quality than those shipped at first; that the shipments were first made from the east side of the railroad, and the best of the heading was placed upon and shipped from the west side of the railroad, which were the last shipments, and that the heading that was there was of better width and quality on the average than that first shipped.

The plaintiff further offered evidence by the said inspectors tending to show that they had had experience in the inspection and matching of heading; that they knew how heading should be matched, and that all the heading shipped would, in their opinion, so average that five pieces of heading would make two heads, or five pieces would make four pieces of matched heading; in other words that said heading would run full one-half two-piece heading and one-half three-piece heading.

92 The plaintiff also gave evidence tending to show that all the heading that was shipped from Lapeer to Detroit was handled on the docks of the Central Railroad Company in the city of Detroit by the car-load by persons employed by the railroad company for that purpose, in seeing to the unloading of the cars and loading upon the vessels, and that the persons so employed by the railroad company kept a record in a book, in which was entered at the time the number of car-loads received and shipped upon each vessel, which book was produced in court and the number of car-loads corresponded with the number of car-loads shipped from Lapeer.

The plaintiff also offered in evidence the bills other than the Maid of the Mist sent by the defendant to the plaintiff's assignors, of the several cargoes, as follows (it is deemed essential to insert here only the date, vessel, and number of heading):

93

Date.	Vessel.	Heading.
June 30.	Sch'r Mollie	57,144
" 26.	Scow Wellhouse	72,884
July 3rd.	" Enright	59,175
" 7th.	" Wakeup	72,044
" 19.	" s Bailey & Duncan	70,376
" "	" Wellhouse	65,232
" "	Sch'r Telegraph	146,312
" 24.	Scows May Breeze and Kane	93,644
" 31.	" " " and Mountain Maid	120,688
Aug. 10.	" Wakeup, Starlight	96,080
" "	Sch'r Jewett	93,684
" "	Scows Wellhouse and Enright	105,448
" 12.	" Wakeup and Ferritt	135,712
" 16.	Sch'r O. Culver	193,920
" 18.	Scow Moore	47,040
" "	" s May Breeze and Jenny Lind	90,412
" "	Sch'r Berlin	137,080
Sept. 24.	Wellhouse	3,592

None of said bills contained culls in any of the cargoes except that of the Maid of the Mist under date of June 12th, 1875.

The plaintiff also offered evidence tending to show that the cars shipped after the agreement to waive inspection were filled fuller and contained more pieces than those shipped before.

94 The evidence offered by the plaintiff of the count at Lapeer was as to the gross number of pieces shipped. The heading mentioned in the bills returned by the defendant to the plaintiff and specified in the above reports was matched headings, and not the total count of gross pieces, but was what the defendant claimed was matched heading specified under the contract. Where there were more pieces required to make a head than two the number was counted as two, and so returned.

Plaintiff rested his case.

95 The defendant to maintain the issue on his part offered evidence tending to show that when the heading was transported by rail it was delivered at the manufacturing works of the defendant corporation. That after the delivery of four car-loads, at the request and for the accommodation of Merritt, who was then engaged or about to engage in the transportation of the remaining heading by vessel from Detroit, said defendant corporation waived the right to receive said heading at the manufacturing works in the first instance, and consented to receive the same at its own dock in the city of Cleveland upon the agreement and understanding made with Merritt, that Merritt & Co. were to pay the extra expense of delivery at the works, such as cost of teaming and expense of dockage, and sundry expenses of that kind, and that $1.50 was agreed upon to cover it, and that such charge was reasonable, and the charge therefore in Schedule E was not disputed.

The defendant further offered evidence tending to show that upon

the receipt of the heading at Cleveland it was inspected by the inspector of the defendant corporation, one Bowzy, who had been in the employ of said defendant for a number of years as inspector and in the matching of heading; that he received and inspected and matched all heading received by the defendant; that he received all the heading from the vessels which were employed to deliver the heading in controversy in this cause; that the vessels which brought the heading in controversy were exclusively loaded with such heading; that upon the arrival of the vessels the heading was wheeled back about two feet into the yard and piled up in great piles or ranks, as they called it, and then it was inspected and matched by the said Bowzy, and afterwards delivered to teamsters to be transported to the manufacturing
96 works of defendant; that upon such delivery they were counted in presence of the teamsters and reported to him, and entered by him upon a book; that the teamsters were paid, however, according to the matched count; that the matching was done upon the dock of defendant.

The said Bowzy, being upon the stand as a witness, gave in detail the gross count of heading that came upon each vessel, and then gave in detail the number of matched heading which was the result of his inspection and matching of each cargo. That he kept a record of all the gross pieces as well as of the matched heading. That in entering upon his memoranda the number of matched heading he always entered the name of the vessel it came in, and that his count of the gross pieces included all the heading except the four car-loads, that is, includes all that came by vessel. That the number of such gross pieces was 2,396,160. That the heading in controversy was kept separate from all other heading and each cargo was kept separate by itself and could not possibly be mixed, except that when two vessels arrived at the same time with the heading in controversy it was unloaded upon the dock and put together in one pile and the report would show the matched heading of the two cargoes.

The witness then detailed the usual manner and mode of matching all heading received by the defendant company. That his report to the defendant corporation was made in matched heading and not the gross number of pieces. That the total amount of matched heading so received was represented by the several reports heretofore mentioned in the bill of exceptions, and that the aggregate is 1,758,539, including 3,592 pieces received in September after the rendition of the account "Schedule F."

That the heading in controversy run better than any other stock that had been received that year, that is to say, matched better.
97 The witness then stated that it had been discovered on the former trial that he had made some errors in computation, that is, in figuring up.

And said evidence further tended to show that the matching of said heading and the inspection thereof was accurate and correct.

That the matching was done in conformity and in accordance with that clause of the contract which provided that whenever more than two pieces are required to make a heading the same shall count as two. That every piece was used in said matching, and none thrown out as culls after the first four car-loads and first cargo.

That a watchman was constantly kept on the dock-yard when the heading was received and matched.

That Bowzy matched the heading with the same care that he exercised with reference to other heading, and honestly and to the best of

his ability and judgment, and had no interest in the defendent company except as an employé.

The witness Bowzy, in detailing the mode of matching the heading as to the other cargoes other than the first, every portion of which he matched, stated that he matched only portions of such other cargoes; for instance, that he took one thousand pieces and laid them off and piled them up and arrived at the matching by average in order to see how many pieces of heading it would take to make the number of inches. That he had instructions not to cull it any more, but just to match it. That this is the usual way of matching heading and is the regular custom and is an accurate way of matching it. I matched the whole number of cargoes in this way.

Being cross-examined by the plaintiff's counsel, said Bonzy testified that the said heading was received in Cleveland from the vessels
98 at the dock of the defendant, and that at times there were two or three vessels there waiting to be unloaded, and that heading and staves were received at the same dock shipped from Wisconsin, besides the staves and heading coming from Detroit. That the first cargo was by his actually matched as it was counted and inspected. That he did not match any more the same as that cargo—not in that way—but by making experiments; he did not know how many experiments he made on the Merritt heading, but made more than one—could not tell how many—that it was according to how the stock run; if the stock run even he did not make many, but he always made more than one; that he made his experiments before the teamsters commenced loading; that they reported to him the total number of pieces and then made a record of it and he reduced it to matched heading; that the reduction was made each time before they went away; that he could not say how long some of the heading remained in the yard before it was hauled away; that he could not tell whether it remained as long as three or four weeks; that his best judgment was that it did not; that he may have stated on the former trial that he thought some of it remained there two or three weeks.

It further appeared on the cross-examination of the witness Bowzy that several mathematical errors occurred in his counts as rendered to the defendant corporation, and that these were first discovered on the former trial.

The defendant thereupon called George Wyman, who testified that he was bookkeeper for the Standard Oil Company; that since the commencement of this suit he had been over the books and made computations and carried out the reductions to see whether there
99 was any mistake made at the time the account Schedule F was rendered to Helme; that the books of Bowzy and all the figures were examined by him with the greatest care possible, and it was found that Bowzy in taking his basis of average made some times a mistake in counting his average, and in one case, in transferring from the stub-books to book D, left out one wagon-load, and that the aggregate of these errors amount to 3,749 matched heading; the testimony of the witness showed that the errors were simply mathematical ones, and were twenty-four in number and made both in favor of and against the defendant company, and that upon the correction of these mathematical errors there was a balance due plaintiff of $144.34.

There was also evidence in said cause tending to show that Merritt, in piling the heading at Lapeer, on west side of the railroad track, had fraudulently piled a large number of culls and concealed them by

good heading. But it was not claimed, on the part of defendant, that any portion of said culls was shipped from Lapeer, or that Helme had any knowledge of such piling, and it was found on the trial that no part of said culls was shipped, but they were removed, by the direction of Helme, when the heading was inspected and shipped, from the rest and left upon the ground.

Evidence also of the number of heading that could be worked up by the men employed at the manufacturing works of the defendant corporation, within the time the heading in controversy was being used and the number of barrels manufactured, tended to show a like result as the testimony of Bowzy as to the gross count of the heading received by the defendant corporation in Cleveland.

The evidence on either side tended to show that the difference between the parties was in the number of the total pieces shipped
100 and received, and not in the matter of matched heading.

There was no evidence which tended to impeach the correctness of Bonzy's matching, so far as the process of matching itself was concerned.

The evidence further tended to show that the said defendant corporation was not aware of any objection or any claim that the statement Schedule F, or the statement in the final letter of September 25th, 1875, was not correct, and was not in any wise advised of the claim of said plaintiff in this suit, until the bill of particulars was served upon its counsel. The evidence further tended to show that such a statement of account as shown by Schedule F was correct in every respect and particular. It was also in accordance with the original entries upon the books of the defendant corporation, made up at the time of the transactions, and also that the statement contained in the final letter of September 25th, 1875, of one lot of heading carried by the schooner Wellhouse, was also correct in every respect and particular.

It was also admitted by the plaintiff's counsel that the money charged against Helme, in the statement Schedule F had been received by him, and that the defendant was entitled to credit therefor.

It also appeared in evidence *that* upon said trial that at the time said heading was loaded, in Detroit, upon the vessels, that bills of lading were made and delivered to the captains of the boats, by the dockmen, showing the car-loads of heading on each vessel, which bills of lading were, upon the arrival of the vessels in Cleveland, by the captains, delivered to the defendant at its office, and there the vessel-freight was paid by the defendant to the captain, and the bills retained by the defendant, and the freight charged to the plaintiff.

101 The following is a copy of the bill of lading of the first cargo:

No. .] DETROIT, *June 2nd*, 1875.

Shipped in good order, by S. W. Thompson, jr., for account and risk of whom it may concern, on board the schooner Maid of the Mist, whereof is master, now lying at the port of Detroit and bound for Cleveland, the following articles, to be delivered in like good order at the port of destination—the danger of navigation, fire, collisions, and breakage of canals only excepted—unto the consignee named in the margin, or to his assigns.

In testimony whereof the master of said vessel hath affirmed four bills of lading, all of this tenor and date, one of which being accomplished the others to stand void.

Standard Oil Company, Cleveland, Ohio. Ac'ct J. J. Merritt & Co., Lapeer, Michigan. 18 cars heading, $ per car.

There were other bills of lading and were, in form, the same as the above, except as to dates, number of cars, names of vessels, and captains. It is deemed essential to insert here only the date, vessel, and and number of cars contained on each date:

Shipped.		Received.			
June	2nd, 1875	June	5th, '75	Maid of the Mist	18 cars.
	17,		21,	Mollie	18
	19,		24,	Wellhouse	14
	23,	July	2,	Wakeup	15
	26,	June	30,	Enright	13
	28,	July	1,	Bailey	8
102	June 30,	July	10,	Maybreeze	10 cars.
	July 2,	"	6,	Duncan	7
"	3,	July	6,	E. Kane,	11
"	9,		14,	Telegraph	34
	13,		16,	Wellhouse	15
	16,		28,	Wakeup	13
	20,		23,	Starlight	6
	20,		22,	Oliver Culver	46
	22,		27,	Mountain Maid	8
	22,		29,	Maybreeze	10
	24,		28,	Baylie	8
	26,	Aug.	2,	Jewett	19
	30,		7,	Wellhouse	13
	30,		5,	Enright	12
Aug.	3,		10,	Ferrity	11
	4,		10,	Wakeup	16
	7,		15,	Berlin	31
	10,		14,	H. Moore	10
	11,		16,	Maybreeze	10
	12,		16,	Jenny Lind	10
Sep.	3,	Sep.	8,	Wellhouse	1
					387

103 There was no evidence in said cause bearing upon the question of loss of heading between Detroit and Cleveland.

The foregoing is all the evidence given in said cause relating to the question raised by the bill of exceptions; and thereupon counsel for the defendant requested the court to instruct the jury as follows:

1. Prior to January 8th, 1876, one Henry Helme having become the owner of the interest of one John J. Merritt and of John J. Merritt & Co. in the certain contracts in question in this cause, and having on that day assigned his interest to plaintiff, the rights of plaintiff in this action are no greater than the rights of Helme would be were Helme himself plaintiff in this suit.

2. Plaintiff himself is bound by all the terms of the contracts equally as John J. Merritt and John J. Merritt and Co. would be had no assignment been made.

3. The defendant, in a letter of August 20th, 1875, rendered to Helme a statement of account, which statement shows the quantity of matched heading which defendant had received and credits of money which de-

fendant had paid. It also showed a statement of interest, freight, dockage, cartage, and insurance which defendant had paid, and which defendant claims are a proper charge against Helme. Helme acknowledges to have received this statement within a day or two, accompanied by a draft of $542.54, the amount shown to be the balance due by said statement, and also the letter in which it was enclosed, and he testifies and admits that he accepted said draft and never made any objection to said statement; such statement of account rendered becomes conclusive between the parties to the contract, unless objection was
104 made to it by Helme within a reasonable time, unless there has been fraud or mistake on the part of defendant.

The court having declined and ruled that the commencement of suit could be treated as an objection to the statement set forth in schedule F, to such ruling and decision of the court counsel for the defendant did then and there except, and therefore further requested the court to instruct the jury:

4. If we take the commencement of suit, January 10th, 1876, as an objection to said account, then, in view of the admission of counsel for plaintiff that there is a daily mail between Cleveland and Lapeer, the objection was not made within a reasonable time; the account cannot be disturbed except for fraud or mistake.

5. There is no evidence in this cause which would authorize you to find that the account was fraudulently made up, or that there was a fraudulent rendition of the account by the defendant.

6. There is no evidence in this cause which would authorize you to go behind such statement of account rendered and impeach its correctness.

7. There is no evidence which will authorize you to find that there was a mistake in the making up or rendition of the account except as to the $144.34, which is admitted by defendant.

8. On September 3rd, 1875, Helme shipped to defendant a single car of heading, as appears by his letter of September 21st, 1875, which was accounted for by defendant, and a statement of account rendered and enclosed in the letter of defendant of date September 25th
105 1875, the receipt of which and draft of $139.82 accompanying is acknowledged by a letter of Helme dated September 28th, 1875.

No objection was ever made to this statement of account. The court is therefore requested to instruct in regard thereto as requested in Nos. 3, 4, 5, 6, and 7, in relation to the account of August 20th, Schedule F.

9. The original contract in this cause provides that the heading—meaning the pieces—shall be delivered on board the cars at Cleveland subject to count and inspection by the Standard Oil Company; that whenever more than two pieces are required to make a head—meaning a complete head—the same shall count as two; that the oil company shall receive and pay for the same, as fast as inspected, at the price of $40,00 per thousand—meaning $40.00 per thousand of complete or matched heading—though this contract is subsequently modified in certain respects by four certain other written contracts, yet the original contract is not qualified, modified, or changed in any respect by said written contracts, so far as the foregoing provisions are concerned, and such provisions are of operative and binding force upon the parties in precisely the same manner and to the same extent as though the subsequent written contracts had not been made.

10. There is no question arising in this cause depending for its solu-

tion upon the terms and provisions of the contracts subsequent to the original contract so called.

11. The evidence discloses that the shipment of heading beginning in May, '75, continuing to August, and a final car-load in September; that after count and matching in Cleveland returns were made
106 by defendant to Helme of the result in matched heading; that such returns were made of each cargo separately, except in one or two instances where more than one cargo arrived at the same time, when the return was a return of the aggregate cargors; that Helme either knew or had the means of knowledge so as to determine and detect any mistake or fraud in the count or matching, if such mistake or fraud was of the magnitude as is now claimed or approximated thereto; that each party acted upon said returns. Helme continued to ship, notwithstanding said returns, without objection, and continued to receive money based in part at least on such returns. The defendant company continued to receive the heading upon the assumption that its count and matching were accepted as correct, and continued to pay money, in part at least, upon that basis. Under the circumstances and under the evidence the plaintiff must now be considered as estopped from objecting to or protesting against the conclusiveness of these returns.

12. There is no evidence in this cause which will authorize you to find that, whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, the same number of pieces of heading was delivered to the defendant company at Cleveland.

13. There is no evidence which will authorize you to find that, whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, that a like number was subjected to the test of the count of the defendant company at Cleveland, or to the test of the count and matching of the defendant company at Cleveland.

14. The terms "count" and "inspection" mentioned in the
107 original contract includes matching.

15. The term "count" alone does not mean the gross count, so as to ascertain the number of pieces of heading, but means that count which shall determine how many pieces of heading it will take to make a complete head.

16. The defendant company, under the terms of the contract, was under no obligation to make a gross count to determine the whole number of pieces of heading or to keep any memorandum or estimate of any such gross count. Its duty was performed if it handled all the heading delivered to it, and honestly and correctly counted it in such a way as to determine the number of complete heads, or, in other words, matched it.

17. There is no evidence in this cause which will authorize you to find that the count, that is, the matching, of Bowzy, was fraudulent or that Bonzy was guilty of any fraud in his count or matching.

18. There is no evidence in this cause which will authorize you to find that Bowzy made any mistake in his process of counting or matching.

19. There is no evidence in this cause of fraud or mistake in the counting or matching or inspection by the defendant company at Cleveland, and their count of matching must be considered as conclusive.

20. The evidence in this cause tends to show that a certain number of pieces of heading was delivered on board the cars at Lapeer or on board vessels at Detroit, and a certain other number arrived at Cleveland. The burden of proof is upon the plaintiff to show that the

same number arrived at Cleveland as were delivered on board the cars at Lapeer, in case you should find that a greater number was delivered on the cars at Lapeer than is accounted for by defendant. 108

And thereupon the court instructed the jury as follows:

GENTLEMEN OF THE JURY: This is an action to recover of the Standard Oil Company, a corporation doing business under the laws of the State of Ohio, at Cleveland, an alleged deficiency in a consignment of heading made by the plaintiff's assignor, Helme, to the defendant. On the 4th of October, 1873, a certain contract was entered into between John J. Merritt and the Standard Oil Co., reciting that Merritt had sold to the oil co. about two millions of heading suitable for oil-barrels, to be sawed 22 inches in length and one inch thick on the sap and full one-half inch thick on the heart edge, and whenever more than two pieces are required to make a head the same shall count as two; and you will bear in mind through this case the distinction that is here made between gross pieces, that is, actual pieces of board, and pieces under the contract, which were two pieces to each head. For the sake of convenience, I will distinguish them as gross pieces and net pieces; that is, whenever each head consisted of more than two pieces of board it was agreed that they should be counted as two pieces and paid for as two pieces, though there might be a half a dozen; and one of the important questions in this case is, how many pieces went to make up a head? 109

The original contract provided that the headings were to be delivered on board cars at Cleveland on or before the 10th day of March, 1875, subjected to the count and inspection of the Standard Oil Company.

On the 1st of April, 1874, there was a supplemental contract made to the original contract, reciting the terms of the original contract and the organization of the firm of Merritt and Helme. The main provision of this modification is, that instead of the heading becoming the property of the defendant when delivered in Cleveland, it should become the property of the defendant when it was delivered on land in Lapeer County leased by defendant, but still subject to the inspection and count of the defendant in Cleveland. 110

(The court here further states the terms of said supplemental contract.)

This modification further provided that all provisions of the above contract referred to, not expressly charged hereby, are to remain in force.

This contract was again modified by a postscript in which the advance was raised from twenty to twenty-five dollars.

Another modification was made on the 25th of May, in which it was recited that the Merritts had received money in excess of the amounts due them in the sum of twenty-five hundred dollars, and reciting that the repayment of this amount by Merritt at the time would be inconvenient to him; and it was agreed that the oil company should extend the time for the payment of this twenty-five hundred dollars, receiving security from Mr. Merritt for its payment; and this modification provided that all other terms of the above contract not inconsistent with this agreement shall remain unchanged.

A still further and third modification was made on the 26th of August, 1874, by which it was recited that this agreement was made at the request and solely for the accommodation of Merritt and Co., by

which the Standard Oil Co. agreed to advance the sum of twenty-five dollars per thousand on the second million of heading, they already having agreed to advance that amount on the first million.

111 This contract was subsequently performed by the delivery of the heading and the payment of the price, and an account was rendered at the close of the consignments, bearing date August 20th, 1875, and a check was remitted by the Standard Oil Co. for the balance, as shown by their account. From the 20th of August until some time in January no action was taken by either party, as appears by this record; that is, no action as against the other. The account or interest of Mr. Helme, who had become the sole party in interest, was then assigned to the plaintiff in this case, and two days thereafter the plaintiff commenced suit in the circuit court for the county of Genesee, by writ of attachment against the defendant, which was subsequently removed by the defendant to this court; and the substance of the action is to recover from the defendant a deficiency which is charged to exist in the accounts rendered by the defendant to the plaintiff's assignor, and relating to this assignment. I charge you as requested by the defendant.

That prior to January 8th, 1876, one Henry Helme having become the owner of the interest of one John J. Merritt and of John J. Merritt & Co. in the certain contracts in question in this cause, and having at about that time assigned his interest to the plaintiff, the rights of the plaintiffs in this action are no greater than the rights of Helme would be were Helme himself plaintiff in this suit; the plaintiff himself is bound by all the terms of the contract equally as Merritt and Co. would be had no assignment been made.

This contract provided, as you will remember, that whenever more than two pieces are required to make a heading the same shall count as two, and that the heading was to be delivered on board the

112 cars in Cleveland, subject to count and inspection by the Standard Oil Company. I think the word "inspection" here refers properly to the culling. That is the ordinary use of the term in lumber contracts, and I see no reason to suppose that this was not the intent of the parties in using the word here—that the inspection then refers to the culling of the poor staves from the good ones. It was further subject to the count made by the Standard Oil Company; and by the word "counting" we are to understand two things here—

1. The counting of the gross pieces; and

2. The counting of the net pieces, which was arrived at by the matching process, so that by the words "count and inspection" we are to understand three things—the culling of the good from the bad, the count of the gross pieces, and the count of the net pieces, which was accomplished by the matching of the gross pieces.

You will observe that the duty of the inspection and count was vested in this man chosen by the Standard Oil Co., and so far as the culling of the bad from the good was concerned both parties would be bound by the action of the inspector appointed by the Standard Oil Co. They would likewise be bound by any action that was taken by the inspector of the Standard Oil Co. involving an exercise of judgment. For instance, the matching would involve to some degree the exercise of judgment. The right of judging under this contract was vested in the inspector of the Standard Oil Company, and with his judgment, fairly exercised, without fraud, both parties would be bound; and I do not know that I can better state the law upon this

subject than by charging as requested by the plaintiff in this third request.

113 That although the written contract provided that the heading should be subject to count and inspection by the oil co., yet if the difference between the count of the company and the actual number is too great to be account' for by any variance of judgment between competent and honest counters, then the company's count is not binding, and the jury should arrive at the correct count by all the evidence in the case.

That is true so far as this matching is concerned. When it involved the judgment of the inspector both parties are bound by his matching, and when he says they would run five to four, or five and a half to four, his judgment or his decision in that regard is binding; but if there was any mistake in the gross count—for instance, in the numerical computation in the number of gross pieces delivered—and that mistakes were made clearly to appear, and the excess was too great to be accounted for by any variance of judgment between competent and honest counters, the company's count of these gross pieces would not be binding, and the jury should arrive at the correct count from the evidence in the case.

As this is a matter of some considerable importance, I will repeat what I have said: That the heading was to be delivered at Lapeer, subject, however, to the count and inspection of the Standard Oil Co. at Cleveland. Now, then, if that count and inspection was fairly made, and made in the exercise of the best judgment of the inspector, then it is binding here, and the plaintiff is not entitled to recover beyond the small amount to which I shall allude hereafter; but if the variance between the count actually delivered to the company and this count and inspection in Cleveland was too great to be accounted for by any

114 error of judgment, then the plaintiff is not precluded from showing the mistake. And in this connection I will refer to certain requests made by the defendant with regard to the rendition of the account.

The court here gives the third, fourth, and fifth requests of the defendant.

The eighth request of defendant I will give, although it has already been given substantially.

COUNSEL FOR DEFENDANT. If your honor will say that the same ruling applies to the last car-load it will answer, without reading the request.

The COURT. Yes. The principal dispute in this case, and really the whole case resolves itself down to this—as to the count of the heading that was actually delivered under this contract. The plaintiff produces considerable testimony tending to show the amount delivered by the plaintiff, and that amount is alleged to be, I think, some three hundred and seventy-eight thousand in excess of that accounted for by the defendant. There was evidence as to the manner of counting by both parties, and when that evidence is examined carefully there does not seem to have been any great difference in the two methods. The headings it seems were piled on either side of the railway track at Lapeer, and were taken from these piles by boys and put into the cars, the boys counting it up four or five at a time, passing them into the car and saying "four" or "five" as it happened to be. And then another handful was taken up and passed into

115 the car in the same way until one hundred was counted. That then a straight line was made upon the inside of the car-door

when the five hundred was counted up, and in that way a cross-mark was made as is usual in such cases, and so on until the car was filled. That when the cars were all filled the amount in each car was reported and a memorandum made by the plaintiffs or their agent of the amount in each car. The cars were then sent down to Detroit, where they were unloaded, and the contents of several cars placed upon scows or schooners and carried to Cleveland; they were then delivered upon the dock of the Standard Oil Company, and were then subjected to the inspection and count. It seems that after four car-loads had been delivered the heading proved to be of such quality and corresponding so nearly with the contract that it was agreed between Mr. Wheeler and the plaintiffs that if the succeeding cargoes were equally as good as the first four that the inspection and culling should be waived.

If, therefore, the plaintiff is entitled to recover at all it must be upon the excess in gross pieces delivered to defendant too great to be accounted for by any variance or error in judgment. The testimony on behalf of defendant tended to show that each cargo was piled separately; that piles were made on the dock of the Standard Oil Company, and then they were passed through the hands of Mr. Bowzy and his assistants, who counted them very much as they had been counted at Lapeer, and placed them upon carts of the Standard Oil Company, whence they were transported to their factory. The rendition of this account would not estop the plaintiff from showing any fraud in this counting. The rendition and the acceptance of this account would not
116 estop the plaintiff from showing any mathematical error, and upon a careful re-examination of the accounts of Mr. Bowzy there seemed to have been a number of mathematical errors in his counts, but nothing was discovered by the defendant to impeach his judgment with regard to the count actually made. You will understand the distinction drawn between the mathematical matter of computation, or of adding up columns of figures, from errors in judgment or errors in inspection; and upon that point I charge you as requested by the defendant.

There is no evidence in this case which will authorize you to find that the count, that is, the matching of Bowzy, was fraudulent, or that Bowzy was guilty of any fraud in his counting or matching.

The court here gave the fourth request of the defendant to charge as follows:

4. The mistakes of Bonzy which appear by the testimony of Wyman, and which he has scheduled in detail, and not such mistakes as will authorize you to find from them that Bowzy made any mistakes or perpetrated any fraud in the exercise of his judgment in counting or matching the heading. If, upon all the evidence, the jury re unable to determine whether there was fraud or mistake in the count upon either side, or if upon being satisfied that there has been fraud or mistake they are unable to determine which party is responsible for it, the verdict must be for the defendant.

There was some evidence in this case which was admitted by the court with hesitation—that in the piling at Lapeer there had been a fraud perpetrated by Merritt upon the Standard Oil Company. The amount to be advanced by the Standard Oil Co. was to be determined by the inspection of the heading piled upon their land at Lapeer,
117 and it would appear from this testimony that Merritt had fraudulently concealed in these piles a large amount of culls upon which he knew he was not entitled to an advance, and induced one

Donnelly, who had been appointed agent of the company, to report them as good heading, and had paid some money to corrupt Donnelly in that regard.

This testimony was admitted as showing some light upon the conduct of the plaintiffs in Lapeer, but at the same time I believe there is no evidence in the case that Mr. Helme was a party to this alleged fraud, and it does not prove by any means that there was any fraud in the count at Lapeer, though it certainly tends to throw some unfavorable light on Mr. Merritt's conduct in this case.

There is a large discrepancy in these counts at Lapeer and Cleveland, and it will be for you to determine, gentlemen, upon whom the responsibility for this difference lies. It is certainly not free from doubt, and indeed I consider it a question of very considerable difficulty to determine why this discrepancy should have existed. The count appears to have been conducted upon both sides with considerable care, and there is nothing to show that the witnesses have acted corruptly, or, judging from their own testimony, that there was any error of judgment.

The court here reads and gives the plaintiff's first request.

If you find that the plaintiff's case is not sustained for any excess you will still find for the plaintiff in the amount of one hundred and forty-four dollars and thirty-four cents, which the defendant admits to be his due. You will find that even if the defense is sustained.

118 The court, referring to the rendition of the account, instructed the jury as follows:

That the rendition and acceptance of the account by Helme in September, 1875, is presumptive evidence that the account is correct. The evidence is uncontradicted that Helme made no complaint to the defendant of the correctness of that account, but kept it in his possession for some five months, and then commenced suit. The general principle is that when one party renders to the other an account of their mutual dealings, and the other party keeps it without objection for a considerable time, that it shall be deemed to be assented to, that it is an admission on his part that the account is correct, and I charge you in this case that the account was kept such a time as would make it an admission on the part of Helme of its correctness. At the same time Helme is not estopped after all from showing fraud or mistake in the account. There is this difference between an admission and an estoppel: If a man is estopped to claim a certain thing he is entirely precluded from, but if it be a mere admission of a certain state of facts he may explain that admission by showing that he was not fully informed, or by showing that since the admission was made he has discovered fraud or mistake in the account. Applying that to this case I instruct you that the rendition of the account to Helme is not an estopp*le*, but simply an admission on his part of the correctness of the account, and he is not precluded from showing that it is incorrect, but the burden of proof is thrown upon him, and when,—as in this case—the account was kept a considerable time and no objection was made to it, *to* the plaintiff ought

119 to make it clearly appear to you that there was error or fraud.

The court gives the defendant's sixteenth request, and further instructed the jury that—

The terms of the contract are not such as to impose upon the defendant company any obligation to return to Merritt & Co. or their assignee the gross number of actual pieces delivered.

It seems that each cargo was received by defendant and inspected by him and return was made or a report was made to the plaintiffs showing the amount of heading in the cargo—that is, of the net pieces. I charge you upon that point that defendant was under no obligation to

return the number of gross pieces, although it might have been more satisfactory to both parties if the gross pieces and the net prices had been returned in each case, as the plaintiff Helme would thereby have been apprised more readily of the alleged deficiency in the returns, but I think he might, by a careful examination of these returns and the addition of one-fifth to each return, have determined the number of gross pieces. At the same time I do not consider the fact that he received these returns without objection precluding him from showing any error or mistake in the count of the defendant. The only admission that I look to as having any great force in this case is the admission to be gathered from the receipt of the final account, and the failure to object to it for so long a time.

The court further instructed the jury if upon all the evidence the jury are unable to determine whether there was fraud or mistake in the count upon either side, or if upon being satisfied that there has been fraud or mistake they were unable to determine which party is responsible for it, the verdict must be for the defendant; and when I say that the verdict must be for the defendant, the verdict must be for the plaintiff for the small excess.

120

The court further instructed the jury:

I desire you to take this case to your rooms and deliberate upon it, and I especially desire to say to you that you should not disagree upon the mere question of damages. If you agree that the defendant had made out his defense you will then render a verdict for the plaintiff for $144.44 and interest. If upon the other hand you think the plaintiff has made out his case, you will estimate as near as you can the amount which you think he is entitled to receive.

Counsel for defendant then requested the court to instruct the jury:

This case is based upon the ground either of fraud or mistake, and there is no evidence of any kind except the two counts, and if the jury find a verdict for the plaintiff they must find a verdict for the entire amount. Either the defendant is liable for this entire amount or he is not liable except for the small sum admitted.

The court declined to give said request.

Counsel for the defendant did then and there except to such ruling and decision.

Counsel for defendant then further excepted to the instructions of the court, as follows:

121

1. To that portion of said instructions in which the court held that by the contract of April 1st, 1874, modifying the contract of October 4th, 1873, the heading became the property of the defendant when it was delivered on land in Lapeer.

2. To the instruction of the court, that by the word "counting" was to be understood the counting of the gross pieces.

3. To the instruction of the court that the account rendered (Schedule "F") was only presumptive evidence of its correctness.

4. To the instruction of the court upon the subject matter of the account rendered and the force and effect of the returns received by Helme.

5. To the instructions of the court that the rendition of the account and retention without objection was the only admission of force in the case.

6. To the refusal of the court to give the said several requests of defendant's counsel, numbered 6, 7, 8, 9, 10, 11, 12, 13, 18, 19, and 20, and each and every of them.

And under said instructions of the court as aforesaid the jury re-

tired to deliberate and afterwards returned into the court with a verdict for the plaintiff for the sum of seventy-six hundred and eighty-eight dollars.

And inasmuch as the said several matters do not appear of record, the said judge before whom said cause was tried, at the request of counsel for defendant, hath signed and sealed this bill of exceptions this 26th day of May, in the year of our Lord one thousand eight hundred and seventy-nine.

122

HENRY B. BROWN, [SEAL.]
District Judge.

123

CLEVELAND, OHIO, *August 20th*, 1875.

Mess. J. J. Merritt & Co., Lapeer, Michigan, in account with Standard Oil Co., Dr.

1874.				
April 1	To draft	1,200		
" 9	"	"	1,500	
" 16	"	"	2,375	
" 24	"	"	2,500	
" 28	"	insurance premiums	270	
May 1	"	"	3,000	
" 14	"	"	2,750	
" 27	"	"	2,000	
June 6	"	" & protest	1,876	40
" 10	"	"	625	
" "	"	"	1,000	
" 18	"	"	1,000	
" 22	"	"	1,025	
July 1	"	"	1,000	
" 9	"	"	1,250	
" 17	"	"	1,250	
" 23	"	"	1,500	
" 31	"	"	1,500	
Aug. 8	"	"	1,250	
" 13	"	"	600	
" 21	"	"	1,000	
Sept. 3	"	"	1,000	
" 3	"	endorsement on note	1,250	
" 8	"	draft	1,000	
" 21	"	"	1,500	
" 21	"	endorsement on note	250	
" 25	"	draft	1,000	
" 26	"	endorsement on note	200	
" 26	"	draft	800	
Oct. 3	"	"	1,125	
" 17	"	"	2,000	
Nov. 2	"	"	2,125	
" 10	"	"	800	
Dec. 1	"	"	1,400	
" 7	"	"	700	
" 9	"	endorsement on note—balance	800	
" "	"	interest on note	91	01
" 10	"	draft	1,925	
1875.				
Feb. 15.	To note		2,000	
	Forward		51,362	41

124	1875.	To amount up	51,362	41
	Feb'y 16.	To interest on note	39	44
	" " "	draft	1,625	
March	5	" "	500	
"	20	" "	1,085	
May	22	" freight car 1387	55	91
"	"	" " " 1176	65	29
"	"	" " " 2048	55	40
"	"	" " " 288	57	65
June	3	" draft ac't freight, Lapeer to Detroit, 18..	402	98
"	9	" freight Maid of the Mist, 18 cars	126	
"	12	" dockage & teaming, 18 cars	122	87
"	21	" freight Mollie, 11 cars	77	
"	22	" draft ac't frieght, Lapeer to Detroit, 27 cars.	589	01
"	24	" freight Wellhouse, 14 cars	98	
"	26	" dockage and teaming, 14 cars	109	33
"	30	" " " " 11 cars	85	71
"	"	" draft ac't freight, Lapeer to Detroit, 39 cars.	785	77
July	1	" freight Enright, 13 cars	91	
"	"	" " Bailey, 8 cars	56	
"	"	" " Wakeup, 15 cars	105	
"	3	" dockage and te'ming, 13 cars	88	76
"	7	" draft ac't freight, Lapeer to Detroit, 25 cars	522	
"	"	" dockage and teaming, 15 cars	108	06
"	8	" freight Duncan, 7 cars	49	
"	10	" freight Maybreeze, 10 cars	70	
"	12	" draft ac't freight Lapeer, to Detroit, 35 cars	787	82
"	14	" freight Telegraph, 34 cars	238	
"	"	" draft 3238, 5.50 on 144 cars	792	
"	17	" " ac't freight, Lapeer to Detroit, 55 cars	1,138	67
"	"	" freight Kane, 11 cars	77	
"	19	" freight Wellhouse, 15 cars	105	
"	"	" dockage and teaming, 34 cars	219	46
"	"	" " " " 15 cars	105	56
		For'd	61,774	32
125	1875.	To amount up	61,744	32
	July 19.	To dockage and teaming 15 cars	97	85
"	22	" draft ac't freight, Lapeer to Detroit, 27 cars	568	73
"	23	" freight Starlight, 6 cars	42	
"	"	" " " Wakeup, 18 cars	126	
"	24	" dockage and teaming, 21 cars	140	46
"	27	" freight " Mountain Maid, 8 cars	56	
"	28	" " " O. Culver, 46 cars	322	
"	"	" " " Bailey, 8 cars	56	
"	29	" " " Maybreeze, 10 cars	70	
"	30	" draft 3366, 5.50 on 127 cars	698	50
"	31	" dockage and teaming, 26 cars	181	03
"	31	" draft ac't freight, Lapeer to Detroit, 67 cars.	1,440	30
Aug.	2	" freight " Jewett" 19 cars	133	
"	7	" draft ac't freight, Lapeer to Detroit, 48 cars	1,118	89
"	9	" freight Enright, 12 cars	84	
"	"	" " Wellhouse, 15 cars	105	
"	"	" draft 3448–5.50 on 70 cars	385	
"	10	" freight Wakeup, 16 cars	112	
"	"	" " Ferritt, 11 cars	77	

"	"	" dockage and teaming, 27 cars	158	17
"	"	" " " 24 cars	144	12
"	"	" " " 19 cars	140	52
"	"	" " " 27 cars	203	56
"	14	" freight H. Moore, 10 cars	70	
"	14	" " Berlin, 31 cars	217	
"	"	" draft 3485	1,100	
"	"	" " 3491, 5.50 on 45 cars	247	50
"	"	" " ac't freight, Lapeer to Detroit, 45 cars	1,014	59
"	16	" freight Maybreeze, 10 cars	70	
"	"	" dockage and teaming, 46 cars	290	88
"	"	" freight Jenny Lind, 10 cars	70	
"	18	" dockage and teaming, 10 cars	70	56
		For'd	71,284	98
126	1875.	To amount up	71,284	98
	Aug. 18.	To dockage and teaming, 31 cars	205	62
"	" "	" 20 cars	135	61
"	19.	" eight months' interest on $25,000 advanced on certificates calling for one million h'dg	1,666	66
"	"	Six months' interest on $24,850 advanced on certificates calling for 994,000 h'dg	1,242	50
			74,535	37

CREDIT.

1874.					
May	19.	By insurance cancelled		216	
"	20.	" note, 90 days, due Aug. 27–30		2,500	
Dec.	7.	" note, 2 months, due Feb'y 7–10		2,000	
1875.			Heading.		
May	24.	" car No. 1387	4,132	165	28
"	25.	" car 288	3,932	157	28
"	"	" car 2048	4,168	166	72
"	"	" car 1176	3,926	157	04
June	12.	" Maid of the Mist, 18 cars	81,914	3,276	56
"	26.	" Wellhouse, 14 cars	72,884	2,915	36
"	30.	" Mollie, 11 cars	57,144	2,285	76
July	3.	" Enright, 13 cars	59,175	2,367	
"	7.	" Wakeup, 15 cars	72,044	2,881	76
"	19.	" Telegraph, 34 cars	146,312	5,852	48
"	"	" Bailey & Duncan, 15 cars	70,376	2,815	04
"	19.	" Wellhouse, 15 cars	65,232	2,609	28
"	24.	" Maybreeze & Kane, 21 car'	93,644	3,745	76
"	"	" Bailey, Mountain Maid, and Maybreeze, 26 cars	120,688	4,827	52
Aug.	10.	" Wellhouse and Enright, 27 cars	105,488	4,217	92
"	10.	" Wakeup & Starlight, 24 cars	96,080	3,843	20
"	"	" Jewett, 19 cars	93,684	3,747	36
"	12.	" Wakeup & Ferritt, 27 cars	135,712	5,428	48
"	16.	" O. Culver, 46 cars	193,920	7,756	80
"	18.	" Maybreeze & Jenny Lind, 20 cars	90,412	3,616	48
"	18.	" Berlin, 31 cars	137,080	5,483	20
"	18.	" H. Moore, 10 cars	47,040	1,881	60
			1,754,947		

"	19.	" 4 month return premiums on insurance on first million heading			151 67
		For'd			75,065 55
		Carried up			75,077 91
127	1875.	By amount up		75,065 55	75,077 91
	Aug. 19.	By 17 days' interest on $500 certificate paid March 5th, 1875	2 36		
"	19.	By 32 days' interest on $1,125, certificate paid March 20th, 1875	10 00		
				12 36	
					75,077 91
		Credit balance			542 54

E. & O. E.

128 (Indorsed:) U. S. circuit court, east. dist. of Mich. George H. Van Etten vs. The Standard Oil Company of Cleveland, Ohio. Bill of exceptions. Filed May 31, 1879. A. Mandell, cl'k.

129 *Assignment of errors.*

The Supreme Court of the United States of America.

THE STANDARD OIL COMPANY OF CLEVELAND, Ohio, plaintiff in error,
vs.
GEORGE H. VAN ETTEN, DEFENDANT IN error.

Now comes the said plaintiff in error by Don. M. Dickinson (one of the firm of Griffin & Dickinson), its attorney, and says, that in the record and proceedings in this cause, and in the giving of the judgment therein, there is manifest error, and amongst others assigns the following, to wit:

1. The court permitted the witness Helme to answer the following questions:

a. State how the heading you saw there compared with that which was shipped on the Maid of the Mist, in your opinion.

b. Can you explain to the jurors fully what matching is?

c. Have you made an estimate by taking the remaining number
130 of cars and comparing them to these, and if they would run the same as the first four cargoes, how many ought there to have been of matched heading?

d. Will you tell the jury what you did with reference to taking advice of counsel to protect yourself?

e. State what else you did for the purpose of seeing whether the defendant had any property in Lapeer County.

2. The court permitted the witness Hugh Coulter to testify as to the total number of car-loads loaded under his direction at Lapeer, and the count of the gross pieces of heading shipped at Lapeer.

3. The court refused to permit the witness Coulter to answer the following question:

Have you not recently stated to different parties, in talking about the matter, that you wanted them to recover here, because you would then get your pay?

4. The court permitted the witness Robert Gummerson to
131 answer the following question:

How would the heading average, as far as width was concerned, on the east and west sides?

5. The court permitted the witness James Innes to answer the following question:

In your opinion, taking that heading, in the experience you have had in handling, manufacturing, and everything about it, what would you say would be a fair average of the width of the pieces?

6. The court permitted the witness John Taggert to answer the following question:

In your opinion, how would this heading, referring to the heading in controversy, run as to matching?

7. The court erred in that portion of the instructions to the jury by which it held that by the contract of April 1st, 1874, modifying the contract of October 4th, 1873, the heading became the property
132 of the defendant corporation when it was delivered on land in Lapeer.

8. The court erred in instructing the jury that by the word "counting" was to be understood the counting of the gross pieces.

9. The court erred in instructing the jury that the account rendered marked Schedule F was only presumptive evidence of its correctness.

10. The court erred in its instructions to the jury upon the subject-matter of the account rendered and the force and effect of the returns received by Helme.

11. The court erred in its instruction to the jury that the rendition of the account and retention without objection was the only admission of force in the case.

133 12. The court erred in refusing to instruct the jury that there is no evidence in this cause which would authorize them to go behind such statement of account rendered, and impeach its correctness.

13. The court erred in refusing to instruct the jury that there is no evidence which would authorize them to find that there was a mistake in the making up or rendition of the account, except as to the $144.34, which is admitted by defendant.

14. The court refused to instruct the jury that there was no evidence which would authorize them to find that the statement of account rendered and enclosed in the letter of defendant, of date September 25th, 1875, accompanying the draft of $139.82, was fraudulently made up, or that there was a fraudulent rendition of said statement.

15. The court refused to instruct the jury that there was no
134 evidence in said cause which would authorize them to go behind such statement of account last aforesaid referred to, and impeach its correctness.

16. The court refused to instruct the jury that as to such statement of account last aforesaid it was conclusive upon the plaintiff.

17. The court erred in refusing to instruct the jury that the original contract in this cause provides that the heading—meaning the pieces—shall be delivered on board the cars at Cleveland, subject to count and inspection by the Standard Oil Company. That whenever more than

two pieces are required to make a head—meaning a complete head—the same shall count as two. That the oil company shall receive and pay for the same as fast as inspected at the price of $40.00 per thousand—meaning $40.00 per thousand of complete or matched heading—

though this contract is subsequently modified in certain respects
135 by four certain other written contracts, yet the original contract is not qualified, modified, or changed in any respect by said written contracts, so far as the foregoing provisions are concerned, and such provisions are of operative and binding force upon the parties, in precisely the same manner and to the same extent as though the subsequent written contracts had not been made.

18. The court erred in refusing to instruct the jury that there is no question arising in this cause depending for its solution upon the terms and provisions of the contracts subsequent to the original contract, so called.

19. The court erred in refusing to instruct the jury that the evidence discloses that the shipment of heading beginning in May, 1875, continued to August, and a final car-load in September. That after count

and matching in Cleveland returns were made by defendant to
136 Helme of the result in matched heading. That such returns were made of each cargo separately, except in one or two instances, where more than one cargo arrived at the same time, when the return was a return of the aggregate cargoes. That Helme either knew or had the means of knowledge so as to determine and detect any mistake or fraud in the count or matching, if such mistake or fraud was of the magnitude as is now claimed, or approximated thereto; that each party acted upon said returns; Helme continued to ship notwithstanding said returns without objection, and continued to receive money based in part at least on such returns. The defendant company continued to receive the heading upon the assumption that its count and matching were accepted as correct, and continued to pay money, in part at least, upon that basis. Under these circumstances, and under the evidence, the plaintiff must now be considered as estopped from objecting to or protesting against the conclusiveness of these returns.

137 20. The court erred in refusing to instruct the jury that—

There is no evidence in this cause which will authorize you to find that whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, the same number of pieces of heading was delivered to the defendant company at Cleveland.

21. The court erred in refusing to instruct the jury that—

There is no evidence which will authorize you to find that whatever may have been the number of pieces of heading delivered on board the cars at Lapeer, that a like number was subjected to the test of the count of the defendant company at Cleveland, or to the test of the count and matching of the defendant company at Cleveland.

22. The court erred in refusing to instruct the jury that—

There is no evidence in this cause which will authorize you to
138 find that Borrzy made any mistake in his process of counting or matching.

23. The court erred in refusing to instruct the jury that—

There is no evidence in this cause of fraud or mistake in the counting or matching, or inspection by the defendant company at Cleveland, and their count of matching must be considered as conclusive.

24. The court erred in refusing to instruct the jury that—

The evidence in this cause tends to show that a certain number of

pieces of heading was delivered on board the cars at Lapeer, or on board vessels at Detroit, and a certain other number arrived at Cleveland. The burden of proof is upon the plaintiff to show that the same number arrived at Cleveland as were delivered on board the cars at Lapeer, in case you should find that a greater number was delivered on the cars at Lapeer than is accounted for by defendant.

DON M. DICKINSON,
Att'ys for Pl'ff in Error.

139 (Indorsed:) The Supreme Court of the United States of America. The Standard Oil Co. of Cleveland, Ohio, pl'ff in error, vs. George H. Van Etten, def't in error. Assignments of error. Filed July 23, '79. A. Mandell, cl'k. Don. M. Dickinson, att'y for pl'ff in error.

140 Know all men by these presents that the Standard Oil Company of Clevelaad, Ohio, as principal, and Oliver H. Payne, residence 648 Euclid avenue, Samuel Andrews, residence 800 Euclid avenue, and Stephen V. Harkness, residence 1191 Euclid avenue, all of Cleveland City, Cuyahoga County, Ohio, as sureties, are held and firmly bound unto George H. Van Etten, of Bay City, Michigan, in the full and joint sum of twelve thousand dollars ($12,000), to be paid to the said George H. Van Etten, his certain attorney, executor, administrator, or assigns, to which payment well and truly to be made we bind ourselves, our successors, and assigns, heirs, administrators, and executors, jointly and severally, by these presents.

Sealed with our seals and date' this thirteenth day of November, A. D. 1877.

Whereas lately at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court between George H. Van Etten, as plaintiff, and the Standard Oil Company of Cleveland, Ohio, as defendant, a judgment was rendered against said defendant and in favor of said plaintiff for the sum of seven thousand six hundred and eighty-eight dollars ($7,688.00), and the
141 costs to be taxed. And the said Standard Oil Company of Cleveland, Ohio, defendant aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said George H. Van Etten, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October, 1878:

Now, the condition of this obligation is such that if the said Standard Oil Company of Cleveland, Ohio, shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE STANDARD OIL COMPANY,
By JOHN D. ROCKEFELLER, [SEAL.]
President.

O. H. PAYNE. [SEAL.]
S. ANDREWS. [SEAL.]
S. V. HARKNESS. [SEAL.]

Sealed and delivered in presence of—
M. R. KEITH.
A. M. MCGREGOR.

142 I, Earl Bill, clerk of the circuit court of the United States for the northern district of Ohio, do hereby certify that I am acquainted with the pecuniary circumstances of Oliver H. Payne, Samuel Andrews, and Stephen V. Harkness, and in my judgment each of them are worth over the sum of one hundred thousand dollars, over and above all liabilities.

In witness whereof I hereunto affix my name officially, together with the seal of said court, at Cleveland, Ohio, this thirteenth day of November, A. D. 1877.

[SEAL.] EARL BILL,
Clerk U. S. Circuit Court, N. D. of Ohio.

I hereby approve the within bond as to form, amount, and sufficiency of security.

(S'd) HENRY B. BROWN,
District Judge.

143 (Indorsed:) United States of America. Supreme Court. The Standard Oil Company of Cleveland, Ohio, pl'ff in error, vs. George H. Van Etten, def't in error. Copy. Bond. Filed Nov. 15, '77. A. Mandell, cl'k. Griffin & Dickinson, att'ys for pl'ff in error.

144 Know all men by these presents that The Standard Oil Company of Cleveland, Ohio, as principal, and Myron R. Keitch, of Cleveland, Ohio, and Levi P. Griffin, of Detroit, Michigan, as sureties, are held and firmly bound unto George H. Van Etten, of Bay City, Michigan, in the full and just sum of one thousand dollars, to be paid to said George H. Van Etten, his certain attorney, executor, administrator, or assigns, which payment well and truly to be made, we bind ourselves, our successors, and assigns, hiers, administrators and executors, jointly and severally, by these presents. Sealed with our seals and dated this 23rd day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

Whereas lately at a session of the circuit court of the United States for the eastern district of Michigan, in a suit depending in said court between George H. Van Etten, as plaintiff, and The Standard Oil Company of Cleveland, Ohio, as defendant, a judgment was rendered against said defendant and in favor of said plaintiff for the sum
145 of seven thousand six hundred and eighty-eight dollars ($7,688) and the costs to be taxed; and the said Standard Oil Company of Cleveland, Ohio, defendant aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to said George H. Van Etten, citing and admonishing him to be and appear at a Supreme Court, to be holden at Washington, the second Monday of October, 1879:

Now the condition of this obligation is such that if the said Standard Oil Company of Cleveland, Ohio, shall prosecute said writ of error to effect and answer all costs if it shall fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

(Sig'd) STANDARD OIL COMPANY, [SEAL.]
By M. R. KEITH, *Its Attorney.*
M. R. KEITH. [SEAL.]
LEVI T. GRIFFIN. [SEAL.]

Approved by—

HENRY B. BROWN,
District Judge.

146 EASTERN DISTRICT OF MICHIGAN, *ss:*

I, Addison Mandell, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify the above and foregoing to be a true transcript of the original record of the judgment of said court in the case therein of George H. Van Etten, plaintiff, against The Standard Oil Company of Cleveland, Ohio, defendant; that I have carefully compared the same with the original thereof, and the same is a true and correct transcript of the whole thereof, and also of the bond in error in said cause; and further that the bill of exceptions and assignment of errors annexed thereto are the originals thereof filed in said cause.

In testimony whereof I have hereunto subscribed my name officially and affixed the seal of said court at Detroit, this sixth day of September, A. D. 1879, *at Detroit*

[SEAL.] ADDISON MANDELL, *Clerk.*

Clerk's fees, $50.20 on writ & return.

(Indorsement on cover:) No. 322. The Standard Oil Company of Cleveland, Ohio, plaintiffs in error, vs. George H. Van Etten. E. Michigan C. C. U. S. Filed 13th October, 1879.

O